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No. 96 ___

In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,
a Colorado non-profit corporation,

Petitioner,

v.

DENISE DEBOSE, and J.D.B., a minor child,
by and through his parent and next friend,
Denise DeBose, and HOMER WOLFE,

Respondents.

Petition For A Writ Of Certiorari
To The Supreme Court Of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Colorado Supreme Court engaging in a sham and subterfuge to avoid the First Amendment when creating the tort of breach of fiduciary duty used against a church to insure a deeper pocket where an allegation of clergy sexual misconduct is made?

2. Is the Colorado Supreme Court ignoring the First Amendment protection of a church's canonical appointment of their intermediary between man and God and in the sacred communication of pastoral counseling by permitting tort claims invading the appointment, supervision, disciplining and discharge of clergy?

PARTIES

The parties to this action are Petitioner, **Bear Valley Church of Christ**, a Colorado non-profit corporation, and Respondents, **Denise DeBose**, and **J.D.B.**, a minor child, by and through his parent and next friend, Denise DeBose, the original plaintiffs, and **Homer Wolfe**, who was employed as a clergyman by the church, and a co-defendant of the church in the lawsuit.

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OPINION DELIVERED BELOW

The opinion from which the Bear Valley Church of Christ files this Petition for Writ of Certiorari to the United States Supreme Court was issued by the Supreme Court of Colorado at *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996). This is the latest of a line of opinions of the Colorado Supreme Court making the church a deep pocket for tort damages by avoiding the First Amendment rights of religious institutions in the sacred communication of pastoral counseling when the church's chosen intermediary between man and God is accused of sexual misconduct.[1] The Colorado Supreme Court issued the opinion December 23, 1996 and denied petitions for rehearing on January 13, 1997. The text of the opinion and the Order denying rehearing to Bear Valley Church of Christ are attached in Appendix A at pages 1a to 38a and B at pages 39a to 40a, respectively.

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 125(3). The denial of the petition for rehearing was on January 13, 1997.

CONSTITUTIONAL PROVISIONS INVOLVED

The first statement in the First Amendment of the United States Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

The Fourteenth Amendment makes the First Amendment applicable to the states:

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[1] *Destefano v. Grabrian*, 765 P.2d 275 (Colo. 1988); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 2135, 128 L.Ed.2d 880 (1994); and *Winkler v. Chambers*, 923 P.2d 152 (Colo App. 1995), *cert. den.* (1996), *cert. den.*, ___ U. S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ (1997).

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In June 1991, Denise DeBose, individually and on behalf of her son, J.D.B., alleging improper conduct during counseling of the son by Wolfe, brought suit against clergyman Homer Wolfe and against the Bear Valley Church of Christ.

The jury returned verdicts in July 1992 after two weeks of trial and one full week of deliberation for Denise DeBose against the Bear Valley Church of Christ on both breach of fiduciary duty and vicarious liability by way of ratification. The jury found Ms. DeBose was barred by the two-year statute of limitations on her claims of outrageous conduct and negligent hiring and supervision. The jury returned verdicts for the son on all claims against the Church.

The jury returned verdicts for Denise DeBose against the minister Wolfe only on breach of fiduciary duty, the trial court having granted Wolfe's motion for dismissal of her claim for outrageous conduct. The jury returned verdicts for the son against Wolfe on both breach of fiduciary duty and outrageous conduct. (See Appendix C at page 41a for verdict summary.)

The Colorado Court of Appeals reversed the trial court and remanded for a new trial on three grounds: (1) A First Amendment jury question exists of the minister's sincerity regarding use of massaging in pastoral counseling as a part of the exercise of his religious beliefs, (2) the jury instructions and verdict forms allowed improper duplicate recovery and (3) DeBose's experts were improperly allowed to give opinions setting a standard for pastoral counseling. *DeBose v. Bear Valley Church of Christ,* 890 P.2d 214, 220, 223, 224 & 227 (Colo. App. 1994). The Colorado Supreme Court granted

a petition for certiorari, reversed the Colorado Court of Appeals and reinstated the trial court verdict.

The Church of Christ consists of a brotherhood of non-denominational autonomous churches without a hierarchy structure.[2] The ministers are ordained directly by the individual congregation from applicants who need neither a seminary degree nor a certification by the wider Church of Christ brotherhood. The ruling authority of each church are the elders, who are selected from the congregation by a vote pursuant to the requirements set forth in the *New Testament*, first chapter of Timothy[3] and first chapter of Titus[4]. They believe the Bible is the source of all conduct. Where the Bible speaks, they attempt to comply and where the Bible is silent they are silent. The Church of Christ holds the belief the elders are responsible for the church members' very souls.

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[2] Membership is about 1,250,000 in nearly 13,000 churches. *Handbook of Denominations in the United States*, Frank S. Mead, Revised by Samuel S. Hill, New Ninth Edition, 1990, p.91.

[3] "This is a faithful saying: If a man desires the position of a bishop, he desires a good work. A bishop then must be blameless, the husband of one wife, temperate, sober-minded, of good behavior, hospitable, able to teach; not given to wine, not violent, not greedy for money, but gentle, not quarrelsome, not covetous; one who rules his own house well, having his children in submission with all reverence (for if a man does not know how to rule his own house, how will he take care of the church of God?); not a novice, lest being puffed up with pride he fall into the same condemnation as the devil. Moreover he must have a good testimony among those who are outside, lest he fall into reproach and the snare of the devil." *Holy Bible*, The New King James Version, Timothy 3:1-7.

[4] "For this reason I left you in Crete, that you should set in order the things that are lacking, and appoint elders in every city as I commanded you – if a man is blameless, the husband of one wife, having faithful children not accused of dissipation or insubordination. For a bishop must be blameless, as a steward of God, not self-willed, not quick-tempered, not given to wine, not violent, not greedy for money, but hospitable, a lover of what is good, sober-minded, just, holy, self-controlled, holding fast the faithful word as he has been taught, that he may be able, by sound doctrine, both to exhort and convict those who contradict." *Holy Bible*, The New King James Version, Titus 1:5-9.

The Bear Valley Church of Christ was started by Roy Baker and others in 1962. Homer Wolfe was appointed by the elders as its third staff minister in 1981 to start a new Family Life Ministry which was to strengthen the families of the church. Wolfe was known to most of the elders before his appointment. Elder Roy Baker, the church founding father, had known him since 1957. Wolfe had been employed for eight years as Minister of Education at the Arvada Church of Christ (Denver metro area) just prior to being appointed by the Bear Valley Church of Christ (Denver metro area).

Homer Wolfe was raised in and served as a minister for 40 years in the Church of Christ religion. Wolfe's family had a history of involvement as ministers in the religious sect since the start of the Church of Christ at the time of Reformation in the 16th century. His father, two brothers, various uncles and cousins served, in recent times, as ministers in the Church of Christ.

Denise DeBose joined the Bear Valley Church of Christ in 1981 through a friend. She had four children with J.D.B., age 17 at trial time in 1992, the oldest. Her husband was an alcoholic compulsive gambler, which ultimately led to a breakup of the marriage in November of 1987 and a divorce in January 1989. In the process, the family underwent bankruptcy and foreclosure on their house in 1985. The Bear Valley Church of Christ provided the family food, babysitting, paid utility bills and even gave her an automobile during this time period. She sought counseling with Homer Wolfe in 1984, which she found satisfactory. She then switched her counseling to Randy Sims from 1985 to 1989. She took her son J.D.B., age 11, to counsel with Wolfe starting in 1985 due to bad grades and the family turmoil. She drove her son to the counseling and would wait outside or returned to pick him up. She observed the early counseling session through a small window. She observed Wolfe hold J.D.B. and comfort him, which Wolfe had asked her permission to do. J.D.B. testified Wolfe had him sit on his lap and would rub his back and legs,

sometimes underneath his shorts and sliding his shirt up. He had no memory of seeing Wolfe in 1987 or in 1988[5]. He

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[5] J.D.B. testified at trial:

"Q: John, was there a time when you didn't see Mr. Wolfe as much for counseling?

A: After I went – I started going to Deer Creek, I don't remember seeing him much after that.

Q: John, when did you go to Deer Creek?

A: When I was in seventh grade.

Q: What year was that?

A: '87.

Q: John, do you – do you know – do you have any memory of seeing Homer Wolfe in 1987?

A: No.

Q: John, do you have any memory of seeing Homer Wolfe in 1988?

A: No, I don't think so."

"Q: What is your memory at this point in time of visits with Homer Wolfe in the fall of 1987: Do you believe you saw him during that period?

A: I don't know.

Q: How about in the first six months of 1988?

A: I don't know.

Q: Do you remember anything about those two periods, the fall of 1987 and the spring – or the first six months of 1988?

A: I don't remember.

Q: Then I take it you can't tell us whether or not during the period of time Homer Wolfe massaged you, rubbed your thigh, or touched your penis at any of those periods?

A: I can't, I don't know.

Q: Okay. The time you're telling us about that he touched your penis occurred before that, then?

A: Yes."

testified in his deposition that Wolfe rubbed his thigh only once and he never remembered Wolfe touching his penis.[6]

In June or July of 1987, Gary Don Wygal, Sr., who was a student minister at the Bear Valley Church of Christ's School of Preaching, and his wife, Mary, made a written complaint about Wolfe's counseling visits with their son, Gary Don Wygal, Jr., age 14. The substance of the complaint was an objection to Wolfe's explanation of sexual organs, explanation of beastiality, and method of touching during counseling. (See Appendix D, at pages 42a and 43a, the letter from the Wygals to the elders preserved by the elders in their meeting minutes.) The elders held a meeting with Wolfe on August 13, 1987 about his counseling and specified it was to be only the sacred communication of pastoral counseling and not involving clinical. (See Appendix E, at pages 44a and 45a, meeting minutes) The elders did not have any thought that other youth counseling with Wolfe were in any way endangered. The Wygals were not satisfied with the elders' resolution of their complaint about Wolfe and the Wygals' son counseling, which led to a second meeting with the elders and Wolfe on March 20, 1988. The Wygals never demanded Wolfe be fired. Gary Wygal, Jr. and Wolfe, after Wolfe's suspension of counseling by the elders on March 23, 1988, exchanged apologies alone in the parking lot about two weeks after March 28, 1988, witnessed by Elder Jerry Taylor.

On March 23, 1988, the elders suspended Wolfe's counseling duties in writing (See Appendix F at page 46a, letter of suspension) and discharged Wolfe over his objection on June 5, 1988 (See Appendix G at page 47a-48a, Wolfe's letter to elders) due to Wolfe's failure to develop the Family Life

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[6] J.D.B. alleged only one incidental contact with his genitals and that allegation reported only in his one visit on April 9, 1992 with psychiatrist Kathy Morall, M.D., hired by the DeBoses only as a trial witness, not a treating physician, and he repeated this allegation at the time of trial on July 15, 1992. This was a complete 180 degree change from his testimony under oath during his deposition of January 3, 1992 and his statements to Dr. Henry Frey, a psychiatrist who conducted an independent examination of J.D.B. at the request of the Church, on April 6, 7 and 10, 1992, which is the exact period the alleged statement was made to Dr. Morall.

Ministry to the elders' satisfaction. (See Appendix H, at page 49a-50a, elders' remarks to congregation, June 5, 1988.)

After Denise DeBose learned of Wolfe's firing on June 5, 1988, she objected to the elders, but on June 9, 1988 Randy Sims telephoned her and said not to let J.D.B. see Wolfe as a result of Sims' conversation with Stephen Magyar, an adult who had counseled with Wolfe, who he was then counseling. On about June 10, 1988, Denise DeBose heard Candice Magyar, Stephen Magyar's wife, at an alcohol support group meeting, state Wolfe had massaged her husband and had him strip naked in front of a mirror in counseling. Mrs. DeBose immediately hurried home and questioned her son about his counseling sessions with Wolfe. He told her Wolfe had only rubbed his leg and back. She took J.D.B. to see Randy Sims, who had only three or four sessions with J.D.B. J.D.B. told Sims the only touching by Wolfe was to the back and legs. Sims did not refer him out to anyone else for any further counseling. J.D.B. received no further counseling until after January 3, 1992, when his deposition was taken in this case, six months prior to the trial in July 1992.

Stephen Magyar had counseled with Wolfe from 1985 to early June of 1988 and had been talked to by the elders on at least four occasions about Wolfe's counseling with him. He fully supported Wolfe from 1985 up to and including the day Wolfe was fired on June 5, 1988, without revealing his later complaints, and he admitted to having deliberately withheld information from the elders who had specifically inquired about Wolfe's methods of pastoral counseling with Magyar.

REASONS FOR GRANTING THE WRIT

I. THE TORT OF BREACH OF FIDUCIARY DUTY CREATED BY THE COLORADO SUPREME COURT, AND THE COURT'S MISAPPLICATION OF THE TORT OF NEGLIGENT SELECTION, IS A SHAM AND SUBTERFUGE TO AVOID THIS COURT'S PRIOR FIRST AMENDMENT RULINGS INVOLVING CHURCHES

In *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988), the Colorado court implicitly recognized that a cause of action

for "clergy malpractice" would not be even *facially* neutral. Therefore, the court declined to recognize that cause of action. However, as a surrogate for "clergy malpractice," the court reinvented the established claim for "breach of fiduciary duty," lifting it out of its traditional context, where it served to impose liability on defendants who misused their control over a plaintiff's *financial* affairs. Originally the concept of fiduciary duties evolved to deal with situations where one person exercises control over the *financial* affairs of another. Fiduciary law developed to provide a "moral dimension to the body of law that regulates economic activity." N. Schaumann, *The Lender and Unconventional Fiduciary*, 23 Seton Hall L. Rev. 21 (1991). Even as to a true fiduciary, not all duties owed are "fiduciary" duties:

> "Finally, fiduciary duties do not include a duty of care. Fiduciaries often owe a duty of care to their beneficiaries, which in some, but not all, cases is more demanding than that owed the general public, **but not every duty owed by a fiduciary to a beneficiary is a 'fiduciary duty.'** It serves no useful purpose so to expand the idea of fiduciary duty. Although fiduciary status at times may be relevant to assessing the duty of care owed a beneficiary, the duty of care is defined and governed not by fiduciary law but by tort (and sometimes contract) law. Clarity of analysis is enhanced by maintaining this distinction. Tort law is no more 'fiduciary' than is tax law, although most fiduciaries are subject to both." 23 Seton Hall L. Rev. at pp. 30-31 (emphasis added).

Disregarding these considerations, *Destefano* expanded breach of fiduciary duty for the express purpose of imposing liability on religious organizations and clergy.

Aside from church cases where clergy misconduct is alleged[7], all the *later* Colorado fiduciary duty cases finding a

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[7] *Destefano v. Grabrian, supra; Moses v. Diocese, supra; Winkler v. Chambers, supra; Bohrer v. DeHart*, ___ P.2d ___, 20 Colorado Journal

fiduciary duty have likewise involved *financial* control. See, e.g., *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755 (1988), *cert. den.* (1989); and *Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993).

Thus, it is apparent that the traditionally narrow concept of breach of fiduciary duty was transformed in *Destefano* for the precise purpose of imposing liability on the Catholic Church based on its status as a religious organization conducting pastoral counseling and the priest based on his status as a Catholic priest who provided pastoral counseling. This transformed cause of action is now being used in Colorado to get other religious organizations and clergy on their status as religious entities, particularly when pastoral counseling is involved. Creating a tort of "breach of fiduciary duty" has been specifically rejected by other jurisdictions in religious settings where clergy are accused of sexual misconduct.[8]

In *Moses v. Diocese*, defense counsel raised the argument that the manifestation of "breach of fiduciary duty" recognized in *Destefano v. Grabrian* was simply another way of denominating a claim for clergy malpractice. The Colorado Supreme Court rejected that argument, on the basis that the clergyman's liability for breach of fiduciary duty was unrelated to his "professional" status as a clergyman, which the court said justified treating that claim differently from a claim for "clergy malpractice":

> "The fundamental difference between the two causes of action in the former is a breach of trust and does not require a professional relationship or a professional standard of care, while the latter is an

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830 (Colo. App. 1996), *cert. pending*; *Klein v. Rocky Mountain Conference*, ___ P.2d ___, 20 Colorado Journal 1372 (Colo. App. 1996), *cert. pending*; and the present case.

[8] *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907 (Nebr. 1993); *Bladen v. First Presbyterian Church*, 857 P.2d 789 (Okla. 1993); *Schmidt v. Bishop*, 779 F.Supp. 321 (S.D.N.Y. 1991); and *Strock v. Pressnell*, 527 N.E.2d 1235 (Ohio 1988).

> action for negligence based on a professional relationship and a professional standard of care. In *Destefano*, we held the defendant owed a fiduciary duty to the plaintiff that 'was created by his **undertaking to counsel** [the plaintiff].' *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). The **position of trust** occupied by the defendant, when coupled with his **positive act of counseling** the plaintiff, resulted in a duty to the plaintiff. The relevant common facts in Destefano and Tenantry's case are not the profession of the defendants; the relevant facts are that the defendants in both cases occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty. In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not. *Id.* at 384-86." 863 P.2d at 321, footnote 13 (emphasis supplied).

However, just as Father Grabrian's "position of trust" in *Destefano was* his position as a Catholic priest, and the counseling he undertook was *pastoral counseling*, Bishop Frey's "position of trust" in the *Moses* case was his "superior position **as a counselor, a bishop, and a final arbiter of problems with the clergy.**" 863 P.2d at 322 (emphasis added). The court referred to Bishop Frey's "position of authority in the church," which gave him "the power to resolve conflicts in the church." *Id.* The court also referred to the plaintiff's belief that Bishop Frey "had the power to decide if she would lose her salvation." *Id.* The court also stated that, although the "clergy-parishioner" relationship is not necessarily a "fiduciary" relationship, it does "involve the type of interaction that creates trust and reliance," and ended with the statement "Courts *have* recognized the fiduciary nature of the clergy-parishioner relationship." *Id.*

Therefore, even though the black and white statement of the expanded cause of action for "breach of fiduciary duty" may suggest facial neutrality, when this tort cause of action is applied to religious organizations and clergymen, it is not neutral. When a religious organization and clergy are sued for breach of fiduciary duty, it is their *status* as a religious entity

and clergy which allegedly gives rise to the existence of a fiduciary duty, and plaintiffs' counsel generally make the effort (as they did in this case) to establish the existence of a pastoral counseling relationship since that is the one context in which the Colorado Supreme Court has ostensibly found this new species of fiduciary duty. A civil claim for breach of fiduciary duty which grows out of the sacred communication of pastoral counseling by clergy cannot possibly constitute a neutral law of general applicability. As applied to the religious institution, the fiduciary duty is premised on its status as a church, and more particularly on its status as a church providing the sacred communication of pastoral counseling by its designated intermediary between man and God. As applied to the individual clergy, the fiduciary duty is premised on status as clergy, and more particularly on status as clergy providing pastoral counseling. The fact that a stockbroker may be subject to breach of fiduciary duty in the course and scope of employment for churning a client's stock investments, or the stockbroker's employer as respondeat superior, or that a bank trust officer may be subject to breach of fiduciary duty for dissipating funds which are held in trust for a client, or the bank as respondeat superior, does not make this new form of fiduciary law a "neutral law of general applicability" when it is used to impose tort liability only on a church because of its status **as a religious body** or on the individual clergy status **as clergy.**

Furthermore, it is critical to note that this cause of action for breach of fiduciary duty is not *applied* in the same manner by the Colorado Supreme Court to other types of defendants as to churches and clergy. In *Crystal Homes v. Radetsky*, 895 P.2d 1179, 1182 (Colo. App. 1995), the plaintiff tried to sidestep the requirement that a client suing a lawyer for professional malpractice must present expert testimony establishing a standard of care and the lawyer's breach thereof, by suing for breach of fiduciary duty, based on the alleged existence of a "confidential relationship between the parties independent of any lawyer-client relationship." Although the Court of Appeals acknowledged the *Moses* decision, it went

on to say that "the foundation for any confidential or fiduciary relationship asserted here **was necessarily based upon the alleged attorney-client status between the parties**,"(emphasis added) since there was "no other basis alleged for plaintiff's asserted justifiable reposition of special trust or confidence in defendant." Thus, the court ruled that any duties owed by the defendant attorney "would be measured against standards applicable to attorneys." Thus, when the plaintiff is making a claim against his attorney, **based on his status as an attorney**, the plaintiff is relegated to a legal malpractice claim. He cannot transform this into a "breach of fiduciary duty claim," even though his evidence shows the requisite "justifiable reposition of special trust or confidence" in the defendant. **When the defendant is a church or clergy, however**, the plaintiff is allowed to invoke the transformed cause of action for "breach of fiduciary duty," **precisely because no "clergy malpractice" claim is available against such defendants**. This demonstrates that the transformed "breach of fiduciary duty claim" is a sham and subterfuge which has been appropriated to accomplish indirectly what the Colorado court recognized it could not accomplish directly. This sham and subterfuge is also confirmed in the Colorado cases of *Awai v. Kotin*, 872 P.2d 1332, 1337 (Colo. App. 1993), *cert. den.* (1994), involving a psychologist, where the claim of breach of fiduciary duty was held duplicative of the claim for negligence and in *Spoor v. Serota*, 852 P.2d 1292, 1294 (Colo. App. 1992), *cert. den.* (1993), involving medical doctors, where the claim of breach of fiduciary duty was held merely duplicative of negligence claims since the duty "to exercise reasonable care and skill" was already imposed upon physicians under the negligence theories. As Justice Kennedy stated in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), "the effect of a law in its real operation is strong evidence of its object." 113 S.Ct. at 2228.

Again, even if a fiduciary duty does exist with the Bear Valley Church of Christ, this duty does not imply a duty of care. Even if it did, a duty of care absent an ascertainable standard of care is moot. Although the "reasonable person"

standard of care in the tort theory of negligent selection and supervision is generally applicable, it is not possible to impose this standard of care on the church elders in their selection and supervision of religious counselors. To do so would excessively entangle the state in ecclesiastical matters. "Secular courts may decide civil disputes between a religious body and its members or its clergy if those disputes involve *purely secular issues* (emphasis added) and can be resolved without entanglement with matters of faith, discipline, or doctrine." *McElroy v. Guilfoyle*, 589 A.2d 1082, 1083 (N.J. Sup. Ct. 1990).

The *McElroy* court unsuccessfully struggled with a lack of clear delineation between secular and ecclesiastical issues and consequently refrained from exercising jurisdiction. *Id.* at 1084-1085. There is no method by which to delineate these matters without excessive state entanglement in ecclesiastical matters. Church counselors and other spiritual servants are not analogous to common law employees. *Schmidt v. Bishop, supra.* Likewise, the standards for selection of church counselors are not analogous to the common law standard of care involved in the hiring of employees. The *McElroy* court recognized that the traditional denominations each have their own intricate principles of governance. *McElroy*, 589 A.2d at 1084. These principles are founded in ancient scripture and have been modified by reformers for nearly two millennia. *Schmidt*, 779 F. Supp. at 332. The courts will excessively entangle the state in ecclesiastical matters if they begin to delve into the doctrines and traditions of the various religious denominations in selecting spiritual counselors. The court in *Nally v. Grace Community Church of the Valley,* 763 P.2d 948 (Cal. 1988) recognized this by stating that because of the differing theological views espoused by the myriad religions it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. 763 P.2d 948 (Cal. 1988). As difficult as it is to impose such a duty on counselors, it is presumably more difficult to impose a duty of care on those who select counselors using religious criteria and practices.

A. This Court's Compelling State Interest Test Has Been Totally Ignored

In cases under the Free Exercise Clause, this Court has applied the compelling state interest test. *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).[9] The compelling state interest requires a three-stage analysis: (1) whether the conduct in question is motivated by a sincerely held religious belief; (2) whether the state action infringes on the free exercise of religion; and (3) whether there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. *Wisconsin v. Yoder, supra*, 92 S.Ct. at 1532. The third stage of this analysis requires a balancing of interests: Whether the state's interest *is* so compelling that the church's free exercise interest must give way. If an overriding state interest is demonstrated, the state must use the least intrusive means to protect that interest. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Thomas v. Review Board*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, supra.*

The Colorado Supreme Court has entirely disregarded this test in *Destefano, Moses* and the present case. The appointing, supervision, disciplining, and discharge of Wolfe as clergy by the Bear Valley Church of Christ without question was motivated by a sincerely held religious belief that the church's clergy is the intermediary between man and God. More to the point, the appointment of clergy and the conducting of pastoral counseling are historically religious activities solely within the four corners of the church and are not subject to examination as to whether sincerely conducted. Additionally, elders in a Church of Christ, as a tenet of the

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[9] The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb also mandates the use of this test in Free Exercise cases, even retroactively to events which occurred before its passage.

religious sect, are responsible for the very souls of church members such as the DeBoses. The very nature of all these activities are per se religious. The state action of allowing tort claims of negligent hiring, negligent supervision, outrageous conduct, vicarious liability by ratification, and fiduciary duty involving canonical appointed clergy, pastoral counseling and the elders' actions direct toward saving the souls of church members infringes on the Church's free exercise of religion. The Colorado Supreme Court so acknowledged in *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996). Thus, the only issue is whether the state interest in allowing tort claims is of sufficient magnitude to override the protected interest of the Bear Valley Church of Christ under the Free Exercise Clause and, if so, what is the least intrusive means to protect the Church while allowing that compelling interest to go forward. The Colorado Supreme Court has completely failed to even address this issue in this case or its prior opinions in *Destefano* and *Moses*.

In reality, there is no compelling state interest of sufficient magnitude to support intrusion as the least intrusive means would be to focus on the conduct itself. Wolfe, not the church, was the alleged perpetrator. Even if the Constitution permitted Colorado to entangle itself with the selection of counselors by church elders, the elders had no reasonable basis to believe Wolfe posed a threat to his counsellees.

B. The Neutral Law of General Applicability Exception Has Been Improperly Applied In Colorado

The Colorado Supreme Court in their creative effort to avoid the First Amendment have relied upon the neutral law of general applicability as allowing their trampling of churches' First Amendment rights. A close look at the true "neutral law of general applicability" exposes this attempt as a further sham and subterfuge.

In *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), Justice Scalia, stated that a neutral law of general applicability may be given effect, even though it has the incidental effect of burdening a free exercise

of religion, without triggering the compelling state interest analysis. Justice Scalia focused on the fact that the criminal statutes prohibiting use or possession of peyote were neutral laws of general applicability, which were applicable across the board, and did not depend on the religious context in which the defendant happened to be using peyote. Since this was a neutral law of general applicability, the state's actions, in denying unemployment compensation benefits to Smith because he was fired for illegal conduct, was upheld.

However, in the later case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, supra,* this Court acknowledged the holding of *Employment Division v. Smith,* but nevertheless returned to the compelling state interest test, because the ordinances there in question were *not* "neutral laws of general applicability" *as applied.* Justice Kennedy noted that:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' *Gillette v. United States,* 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), and 'covert suppression of particular religious beliefs,' *Bowen v. Roy* (476 U.S. 693) at 703, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." 113 S.Ct. at 2227.

In *Wisconsin v. Yoder, supra,* this Court had earlier said that "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 92 S.Ct. at 1536. However, there seems to have been speculations that *Employment Division v. Smith* applied any time a law was *facially* neutral. *Church of the Lukumi Babalu Aye* indicates the contrary.

The claims brought against the Bear Valley Church of Christ are not neutral laws of general applicability. Neutrality

and general applicability are distinct and separate requirements. In *Church of the Lukumi Babalu Aye*, Justice Kennedy noted that these concepts are interrelated, and that a law which fails to satisfy one requirement will in all likelihood, fail to satisfy the other (113 S.Ct. at 2226), but failure to satisfy *either* requirement triggers a compelling state interest analysis. Neutrality is the first element. As stated above, neutrality on its face may not be neutral *as applied*. Improper "targeting" of religious activity is an indication of non-neutrality, and the expressions of purpose associated with the enactment of a law may demonstrate improper targeting. Here, the problem of applying these constitutional principles is complicated because we are dealing with common law causes of action rather than statutes. Nevertheless, the decisions handed down by the Colorado Supreme Court in *Destefano* and *Moses*, as well as this case, themselves demonstrate this constitutionally impermissible targeting.

Lukumi Babalu Aye also held that one ordinance was not neutral because it represented "a system of 'individualized governmental assessment of the reasons for the relevant conduct.' " 113 S.Ct. at 2229. Similarly, the essence of these common law claims in Colorado is to establish a system of individualized governmental assessment of the reasons for the defendant's conduct.

The cause of action for "breach of fiduciary duty," as applied to impose liability on clergy and religious institutions, also fails as a law of "general applicability." In *Employment Division v. Smith*, the statute prohibiting the use or possession of peyote was considered to be a law of general applicability precisely because it applied to everyone. When the peyote statute was applied to Smith, it was *not* applied to him *because* of his status as an adherent of a Native American religion. The fact that the application of this general law burdened Smith's religious practice was treated as an "incidental effect." In the present case, the transformed cause of action for "breach of fiduciary duty," on its face does not apply to everyone, but only to certain persons or religious institutions considered to be in a superior position in whom trust has been reposed. Not all persons in a position of trust

are included. Furthermore, as applied to impose liability on church or clergy, it is precisely their *status* as churches or clergy which triggers the liability.

In *Lukumi Babalu Aye*, Justice Kennedy concluded that it was not necessary there to "define with precision the standard used to evaluate whether a prohibition is of general application," because the City of Hialeah's ordinances were clearly too under inclusive to qualify. 113 S.Ct. at 2232. The court held that, to the extent the city might have had legitimate interests in protecting the public health and preventing cruelty to animals, the ordinances should have been directed at *conduct* contrary to these interests without regard for who might engage in that conduct. Because they were tailored to "rituals" and "sacrifices," the ordinances were not "generally applicable." In the present case, the transformed cause of action for "breach of fiduciary duty," is not generally applicable on its face, and it is certainly selectively applied to clergy and religious institutions.[10] Conduct-oriented government action (such as a criminal assault statute or the civil tort of battery) may be "generally applicable," but this status-based claim is not.

Thus, the transformed cause of action for "breach of fiduciary duty" recognized and applied in *Destefano v. Grabrian, Moses v. Diocese* and in the present case is neither a neutral law nor a law of general applicability. This requires that its application to Bear Valley Church of Christ be strictly scrutinized under the compelling state interest test, given the per se religious activities involved. However, as noted, the Colorado Supreme Court has completely ignored the compelling state interest test and have refused to address its requirements even when the issue is raised by the minister or church.

Even if a neutral, generally applicable law applies to Bear Valley Church of Christ, the First Amendment can bar application of such a law infringing upon a hybrid right

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[10] In Colorado, breach of fiduciary duty cannot be a claim against lawyers, psychologists or medical doctors. *See Crystal Homes v. Radetsky, supra; Awai v. Kotin, supra;* and *Spoor v. Serota, supra.*

involving a Free Exercise claim and "communicative activity". *See Employment Division v. Smith*, 494 U.S. at 882. A church's selection of a minister or counselor is obviously a religiously motivated action. The ecclesiastical selection process is also a forum for protected speech. Elders routinely exercise the religious free speech of sharing their views, debating issues or qualification, and sharing prayers regarding ministerial candidates. The application of neutral, generally applicable principles of law such as a duty and standard of care under the theory of negligent selection would have a chilling effect on such religious speech. Debates and discussions among elders who select counselors and ministers are often a matter of conscience and spiritual discernment, beyond the measure of articulable reason or logic. Responding to the threat of tort liability, elders would be forced to devalue their own spiritual decision-making practices to satisfy the "reasonable person" element of theory of negligent selection. Such an application of law chills the necessary religious "communicative activity" inherent to ecclesiastical decision-making practices. *Id.*

II. THE COLORADO SUPREME COURT IS IGNORING THIS COURT'S PRIOR RULINGS REGARDING FIRST AMENDMENT APPLICATION TO CANONICAL APPOINTMENT OF CHURCHES' INTERMEDIARIES BETWEEN MAN AND GOD AND IN THE SACRED COMMUNICATION OF PASTORAL COUNSELING

A. This Court's Prior Rulings Established the First Amendment Protects a Church When Appointing, Supervising, Disciplining or Discharging Clergy Who Are Its Intermediary Between Man and God

The principle that civil courts are required to accept as conclusive the decisions of a church on matters involving clergy is long established by the decisions of this Court from *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-729 (1871); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94,

113-115, 120-121 (1952) [later opinion, sub. nom. *Kresshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960)]; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-449 (1969); to *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

The classic statement of the principle involved is the following often-quoted language from *Watson v. Jones*, 80 U.S. at 727, 729:

> " . . . whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding upon them, in their application to the case before them."
>
> "It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."[11]

In *Gonzalez* (280 U.S. at 16) this Court phrased the principle as "Because the appointment [to a chaplaincy] is a canonical Act, it is the function of the church authorities to determine what the essential qualification of a chaplain are and whether the candidate possesses them."

In analyzing the constitutional principles applicable to the selection and removal of clergy by churches, this Court stated in *Kedroff* (344 U.S. at 116):

> "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now

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[11] The *Watson* case holding remains today uncompromised on matters of doctrine, church discipline, religious office, and religious practice. *Tort Claims Against Churches and Ecclesiastical Offices: The First Amendment Considerations*, Carl H. Esbeck, 89 W.Va. Law Rev. 1, 16-17 (Fall 1986).

> be said to have federal constitutional protection as a part of the free exercise of religion against state interference."

In *Presbyterian Church In The United States* (393 U.S. at 667) this Court stated as to the constitutional principle involved, "The First Amendment prohibits a state from employing religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards . . . Thus, a civil court may no more review a church decision applying a state departure from doctrine standard than it may apply that standard itself."

In *Serbian Orthodox Diocese* (426 U.S. at 713) this Court stated:

> " . . . civil courts are bound to accept the decisions of the highest judicatories of a religious organization of higher polity on the manners of discipline, faith, internal organizations, or ecclesiastical rule, custom or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in the sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church adjudicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them."

Contrary to Colorado, other jurisdictions have fully followed this Court's prior precedent.[12]

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[12] *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wis. 1995); *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995); *Rappolo v. Moore*, 644 So.2d 206 (La. App. 4th Cir. 1994), *cert. den.* 650 So.2d 253; *Bladen v. First Presbyterian Church, supra*; *Schieffer v.*

B. The Decision Below Knowingly Refuses to Follow This Court's Prior Precedent

The elders appointed Wolfe as a clergy in the Bear Valley Church of Christ and assigned him duties to develop the new Family Life Ministry, including the sacred communication of pastoral counseling for the congregation. The basis of the lawsuit by J.D.B. and his mother is an allegation Wolfe improperly touched the minor during this pastoral counseling. The trial court allowed J.D.B. and his mother at the trial, despite the First Amendment, to question the adequacy of the elders' knowledge of Wolfe's background when appointing him intermediary between man and God, to question the qualifications of Wolfe to conduct the sacred communication of pastoral counseling, to claim Wolfe's method of pastoral counseling was below the standard for secular counseling, to question the right of the elders even to permit pastoral counseling by Wolfe, to question the right of Wolfe to touch people in pastoral counseling, to claim a clergy person must be supervised in conducting pastoral counseling, to claim the elders as mere lay persons were not by experience and education qualified to supervise Wolfe in pastoral counsel, to claim the elders' supervision of Wolfe in pastoral counseling was a direct cause of injury to the minor, to claim the elders did not conduct an investigation of the Wygals' complaint as the DeBoses' hindsight dictated, to claim the elders' job description for Wolfe as intermediary between man and God could be second-guessed by the DeBoses, to claim the elders did not

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Catholic Archdiocese of Omaha, supra; *Schmidt v. Bishop, supra*; *Doe v. Roman Catholic Church*, 602 So.2d 129 (La. App. 4th Cir. 1992); *Eckler v. Gen. Coun. of Assemblies of God*, 784 S.W.2d 935 (Tex. Ct. App. 1990); *Nally v. Grace Community Church of the Valley, supra; Rayburn v. General Conference of the Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *Simpson v. Wells Lamont Corporation*, 494 F.2d 490 (5th Cir. 1974); and *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

properly define the sacred communication of pastoral counseling for Wolfe, to claim the elders were required to immediately destroy Wolfe as effective clergy in the church by informing the entire congregation of the Wygals' complaint at the very outset and to claim the elders were required upon their ultimate forced discharge of Wolfe to air the full particulars of their dissatisfaction with Wolfe to the entire congregation. The Colorado Supreme Court in their opinion specifically approved by reference the above evidentiary matters as permitted conduct in the trial of a church regarding alleged conduct of clergy in pastoral counseling. (See Appendix A, at page 23a, footnote 14.)

The sacred communication of pastoral counseling does not become mere "counseling"[13] in order to "secularize" the occasion and the canonical appointment of the intermediary between man and God in the relationship between a church and its clergy is not simply an employer-employee relationship, because there is potentially some degree of supervision involved. The act of appointing clergy to be intermediary between man and God by a church in a recognized religious sect is not secular "hiring" and the laying-on of hands to better facilitate communication with God in the sacred communication of pastoral counseling is not merely a "touching." If the courts of Colorado can relabel these historically significant per se religious acts and thus call them "secular" conduct to avoid the First Amendment rights of religious organizations and then turn loose attorneys to second-guess the church's actions in these religious events, the First Amendment has not only ceased to exist in Colorado as the Constitution and this Court has mandated in its many prior rulings, but churches have truly become converted to mere deep pocket sources for tort conduct of clergy never even contemplated or authorized by the religious organizations.

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[13] Colorado Revised Statutes § 12-43-215 exempts "any person engaged in the practice of religious ministry" from the applicable professional standards, requirements for licensing and regulations for psychotherapy, psychology, clinical social worker, marriage and family therapy, professional counseling, and school psychology.

C. The Colorado Supreme Court Has Acknowledged This Court's Prior Decisions But Avoids Them on its Own Creative Exceptions

In *Van Osdol v. Vogt*, *supra*, the Colorado Supreme Court itself established its own sham and subterfuge in *Destefano, Moses* and the present case when it stated, "The choice of a minister is a unique distillation of a belief system. Regulating that choice comes perilously close to regulating belief." "Whether the courts should intrude into ecclesiastical decisions regarding choice of a minister is an issue that bridges both religion clauses of the First Amendment, because it potentially involves governmental intrusion into both ecclesiastical and individual decision-making." "However, whether we look to Free Exercise Clause analysis or to Establishment Clause analysis, we find a church's choice of a minister is uniquely protected." "Because of the minister's unique role in the church, the appointment of a minister is inherently of prime ecclesiastical concern." All above *Id.* at 1126-1127. "The decision to hire or discharge a minister is itself inextricable from religious doctrine." "Thus, the church's decision of who to hire as a minister necessarily involves religious doctrine." *Id.* at 1128. "The principle underlying the reasoning in all these cases is that the appointment of a minister is an expression of the beliefs of the church and the 'embodiment' of the religion." "In analyzing a church's choice of a minister, attempts to separate arguably impermissible discriminatory grounds for a decision from grounds stemming from the church beliefs excessively entangles a court with religion. Hence, the Establishment Clause insulates a religious institution's choice of a minister from judicial review." *Id.* at 1132-1133. "What we do hold is that a church's choice of who shall serve as its minister is inextricably related to religious belief and therefore invokes the protection of the First Amendment." *Id.* at 1134.

However, despite the Colorado Supreme Court's *Van Osdol* opinion's overwhelming words of understanding acknowledging this Court's pronouncements that a church's intermediary between man and God is a pro se protected First

Amendment area involving the very heart of religious belief and practice, at footnote 17 of *Van Osdol* (908 P.2d at 1132 and 1133) the Colorado Supreme Court continued to ignore the very principle established by this Court on the Colorado Supreme Court's own previously created exception[14] by stating:

> "17. While claims for illegal hiring or discharge of a minister inevitably involved religious doctrine, that is not the case for a claim of negligent hiring of a minister. The claim of negligent hiring is brought after an employee has harmed a third party through his or her office of employment. An employer is found liable for negligent hiring if, at the time of hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others. *Connes v. Molalla Transp. System, Inc.*, 831 P.2d 1316, 1321 (Colo. 1992); Restatement (Second) of Agency § 213 cmt. d (1958). Hence, the court does not inquire into the *employer's broad reasons for choosing* this particular employee for the position, but instead looks to *whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring*. This inquiry, even when applied to a minister employee, *is so limited and factually based that it can be accomplished with no inquiry into religious beliefs. See Moses v. Diocese of Colo.*, 863 P.2d 310, 320-21 (Colo. 1993) (holding that although courts must not become embroiled in interpreting or weighing church doctrine, a claim of negligent hiring of a minister is actionable because it does not require such interpretation or weighing of religious belief, but instead is merely application of secular standards to secular conduct), *cert.*

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[14] *Destefano v. Grabrian, supra*, and *Moses v. Diocese of Colorado, supra.*

denied, ___ U.S. ___, 114 S.Ct. 2135, 128 L.Ed.2d 880 (1994)." (Emphasis added.)

This creative "exception" carved out by the Colorado Supreme Court is referred to in the opinion in the case now before this Court (See Appendix A, at pages 16a and 17a), but even this so called "limited and factually based" creative exception is not what has been allowed by the Colorado Supreme Court in the present case. Instead, the entire ecclesiastical process within the four walls of the Bear Valley Church of Christ in appointment, supervision, discipline and discharge of clergy and the sacred communication of pastoral counseling has been ripped bare to examination, wild hindsight, rampant speculation and secular standards devised by the DeBoses, as approved and applied by the courts. J.D.B. and his mother were allowed to invade and conduct arbitrary speculation of the elders' "broad reasons for choosing" Wolfe as the church's intermediary between man and God, the entire process of conducting the sacred communication of pastoral counseling by the Church, and to suggest and substitute standards for pastoral counseling and handling complaints in the Bear Valley Church of Christ about clergy, the supervision of clergy and the discharge of clergy.

D. The Colorado Supreme Court Is Imposing Secular Standards On The Sacred Communication of Pastoral Counseling

The Colorado Court of Appeals in *DeBose v. Bear Valley Church of Christ*, *supra*, identified improper testimony of four separate "expert" witnesses allowed for the plaintiffs by the trial court:

1) The first expert (Rev. Marie Fortune), a minister in the United Church of Christ, which is not the same denomination as the Church of Christ, who was director of a church-operated center for domestic and sexual abuse prevention in Seattle, tendered as an "expert in theology" and preventing "reasonably foreseeable harm" in church settings, testified "nudity or partial nudity" is "inappropriate in the pastoral

relationship" but might be appropriate in either a "medical setting" or "licensed massage therapist" setting,

2) the second expert (Kathy Morall, M.D.), a psychiatrist, testified Wolfe's "counseling" constituted "sexual abuse" and that massage was sexual abuse,

3) the third expert (Randy Sims), a licensed professional counselor, testified as a psychotherapist based on J.D.B.'s belated description he was sexually abused, said any touching is unethical, either biblically or therapeutically touching should not happen, and children should never be touched in therapy, and

4) the fourth expert (Gary R. Schoener), a clinical psychologist, with alleged "extensive experience in supervising pastoral counselors," testified Wolfe's use of nudity and discussion of circumcision was not "legitimate counseling" in a "pastoral counseling context."

The Court of Appeals then set forth *Id.* at p. 227 the expert testimony was prejudicially erroneous because:

1) a portion of the testimony was irrelevant as not regarding the minor plaintiff's complaints,

2) some of the testimony called into question the validity of Wolfe's belief's concerning the efficacy of touching as grounded in religious principles,

3) it was irrelevant what was appropriate from a "therapeutic" standpoint, and

4) the testimony sought to establish a "professional standard for pastoral counseling, i.e., that a minor counselee should never be touched by any counselor" and was tantamount to imposing improper liability for "malpractice" for violation of a professional standard of conduct citing *Moses.*

The Colorado Supreme Court, however, reversed the Colorado Court of Appeals and by doing so directly approves of courts allowing the setting of professional standards for pastoral counseling.

Despite this direct approval, the Colorado Supreme Court itself in *Destefano, supra*, had previously stated " . . . spiritual counseling . . . may implicate First Amendment

rights . . . " *Id.* at p. 283, and "If the alleged conduct of Grabrian was dictated by his sincerely-held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult First Amendment issue." At *Id.* p. 284. In *Destefano* the Colorado Supreme Court also quoted with approval "In the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact 'part of the belief and practices' of the religious group." *Id.* at p. 283-234.

The appointing of a minister and assigning him the duty of the sacred communication of pastoral counselor is "part of the belief and practices" of the Bear Valley Church of Christ. Any activity by the *elders* in dealing with Wolfe and his conducting the sacred communication of pastoral counseling from the perspective of the church involves the First Amendment. Under this Court's prior rulings, the Colorado court is without jurisdiction to question or criticize the manner in which the elders chose to have pastoral counseling conducted by Wolfe in this case. The elders did not have any prior allegation pointing to a propensity of Wolfe to sexually molest minors *before* they assigned him pastoral counseling or even *before* they discharged him.

The elders were aware only of a concern Wolfe was venturing into areas of medical/clinical counseling and they specifically ordered him to do only pastoral or spiritual counseling. This makes eminent sense as their responsibility under their religious beliefs were for the very soul of the members such as J.D.B. and his mother. As stated in *Rayburn v. General Conference of the Seventh Day Adventists, supra*, " . . . The free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it." Here, the act of the elders' decision was regarding the sacred communication of pastoral counseling and when Wolfe was later accused of improperly performing the pastoral counseling, it does not create a right of second-guessing the elders' motivation behind their decision, before the allegation was made. Even if the Wygal complaint preceded the alleged J.D.B./Wolfe event, which it did not, the elders' decision of

whether or not a complaint involving medical/clinical counseling by Wolfe about a minor's circumcision was grounds for immediate discharge or whether the elders could continue Wolfe doing pastoral counseling under specific instructions he restrict himself to spiritual areas is not open to second-guessing by the DeBoses or the Court. The First Amendment religion clause means that religious beliefs and religious expression are too precious to either be proscribed or prescribed by the State. *Lee v. Weisman*, 505 U.S. 577, 120 L.Ed.2d 467, 482, 112 S.Ct. 2649 (1992).

As stated in *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine Law Rev. 137, 152 (1986), (cited by Justice Erickson of the Colorado Supreme Court in support of the dismissal of the clergy malpractice claim in *Destefano, supra*):

> "[A secular standard], one which is identical to the standard imposed on psychiatrists and psychologists, is impractical and is violative of constitutional protections. As Rabbi Ben Zion Bergman notes, '[t]the same level of competence and professional knowledge cannot be expected from the clergyman as can be expected from the psychiatrist, whose education and training is more intensively specialized.' Since the training of the clergy varies from that of licensed psychologists, so must the standard of care.
>
> In order to determine if a psychiatrist has violated the standard of care, comparisons are made between the alleged offender and established therapists, focusing on fundamental techniques and principles. However, since members of the clergy often do not follow conventional secular counseling models or practice similar techniques, the proposed standard breaks down. *The vast diversity within the religious community makes a comparison of accepted religious techniques virtually impossible, even to the point of identifying an acceptable standard. Since the fundamental concepts of the clergyman-counselor are foundationally religious in nature, the*

courts cannot scrutinize their validity without facing constitutional bars. Consequently, a sexual standard cannot be imposed because of the inherent difficulty in evaluating an alleged offender's conduct using secular criteria and because the content and methodology are beyond the scope of judicial review." (Emphasis supplied.)[15]

CONCLUSION

Only this Court stands between the Colorado Supreme Court's sham and subterfuge tort of breach of fiduciary duty imposed to avoid the First Amendment and the Colorado Supreme Court's redefining of the sacred communication of pastoral counseling into mere secular counseling and the canonical appointment of a church's intermediary between man and God into a mere secular employer/employee relationship. Only this Court remains as a bulwark to defend the First Amendment from the abuse and erosion being imposed for the purpose of establishing the church as a deeper pocket for tort-based damages resulting from claims based on alleged misconduct of clergy which very misconduct is outside the course and scope of a clergy person's high calling.

Dated this 4th day of April, 1997.

Respectfully Submitted,

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[15] See also M. Bartel in *Clergy Malpractice After Nally*: 'Touch Not My Anointed, and to My Prophets Do No Harm.', 35 Vill.L.Rev. 535 (1990) at 553:

> pastoral counseling involves the application of religious insight to day-to-day problems.

APPENDICES

APPENDIX A

SUPREME COURT, STATE OF COLORADO
No. 95SC42 December 23, 1996

BEAR VALLEY CHURCH OF CHRIST,
a Colorado corporation, Petitioner/Cross-Respondent,

v.

DENISE DeBOSE, and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, Respondents/Cross-Petitioners,

and
HOMER WOLFE, Respondent/Cross-Petitioner.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

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JUSTICE LOHR delivered the Opinion of the Court.

This case presents constitutional, evidentiary, and jury instruction issues arising from the trial of tort claims brought against a religious institution and one of its former pastors. The plaintiffs, a mother and her son, filed suit against their former church and the pastor, alleging a variety of tortious offenses stemming from the pastor's conduct during counseling sessions with the son. The trial court allowed a jury to consider the claims, and the jury returned several verdicts for the plaintiffs. In a divided opinion, the Colorado Court of Appeals reversed the judgment entered on the verdicts and remanded the case for a new trial. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 218, 231 (Colo. App. 1994). We granted certiorari and now reverse the judgment of the court of appeals and remand with directions to reinstate the trial court's judgment.

I.

Several families organized and incorporated the Bear Valley Church of Christ (Bear Valley) in 1962. Bear Valley is an autonomous church, administered by a panel of elders whose responsibilities are to oversee and shepherd

the activities and fellowship of the Bear Valley congregation. In 1981, Bear Valley hired Homer Wolfe to head a new Family Life Ministry and to engage in counseling efforts. Wolfe and the Family Life Ministry operated under the direct supervision and authority of the Bear Valley elders.

In 1981, the same year that the elders hired Wolfe, Denise DeBose joined the Bear Valley congregation. DeBose sought counseling with Wolfe in 1984 to discuss her marital problems. She found Wolfe's counseling to be satisfactory, but for other reasons changed counselors. DeBose brought her son (DeBose child, or child)[1] to Wolfe for counseling once in 1984, and then, as DeBose testified, "on a consistent basis, but sporadically throughout the year" from the fall of 1985 until Bear Valley terminated Wolfe's employment in June of 1988. The impetus for the counseling was Wolfe's request to see the child in counseling and Debose's concern that her child's poor scholastic performance reflected the turmoil of her marriage. During her child's first counseling session with Wolfe, DeBose observed through a window to Wolfe's office that her child was crying and that Wolfe was holding and comforting the child.

According to the child, Wolfe engaged in a pattern of inappropriate touching during the child's counseling sessions. The child testified that in the first couple of counseling sessions with Wolfe, "he would sit me on his lap

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[1] The DeBose child was born on October 25, 1974. He therefore was about eleven years old when he began counseling sessions with Wolfe.

and rub my back and my leg."[2] The child explained that sometime before the fall of 1987, Wolfe "slid [my] shirt up," and "rubbed me up underneath my shorts, by my penis and on my back," that Wolfe "would rub my leg up to my side and just touch my penis," and that Wolfe touched his "privates." The child testified that Wolfe rubbed the child's thigh "[a] lot." The child also related that during the massaging, Wolfe told him "that my mom would love me, my dad would love me, and that Jesus loved me, and [Wolfe] would love me." The child also testified that there were no counseling sessions where Wolfe did not "rub" him.[3]

Wolfe, however, testified that he never massaged or touched the child inappropriately in any way. Wolfe admitted that he examined genitalia and used massage and disrobing techniques on other counselees, but insisted that he always stopped massaging "[j]ust above the knee," because "any good thing can be carried too far, even." Wolfe maintained throughout the trial that in his counseling activities he never actually touched any client's genitals.

In May of 1987, Gary Don Wygal, Sr., met with Wolfe, an elder named "Sandy" Sanderson, and a Bear Valley instructor named Dick Brant, to complain about the methods Wolfe was employing in counseling the Wygals'

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[2] The DeBose child later amended his statement, however, by testifying that the back massages did not begin until the third or fourth counseling session with Wolfe.

[3] The child's memory regarding these events improved between the time of the child's deposition and the time of the child's testimony, after the child met with several therapists.

fourteen-year-old son. Wygal's specific complaints included the allegation that Wolfe asked to examine the youth to see if he had been properly circumcised. In contrast, Sanderson testified that Mr. Wygal never presented a definitive complaint in May of 1987 and that the Wygals' fears were a "smoke cloud" for "what [their son] was interpreting that happened."[4] Another elder, Jerry Taylor, testified that Sanderson approached him and other elders in July of 1987 with the Wygals' complaint, and that the elders understood that there were accusations of "some touching and some massaging."

The initial meeting in May of 1987 resulted in a meeting in June or July of 1987, where Wygal and his wife, Mary Wygal, met with Wolfe and the Bear Valley elders. The Wygals testified that the June or July of 1987 meeting served as a forum for the Wygals to express their concerns about Wolfe's counseling methods with their son, including Wolfe's questions regarding circumcision.[5] Mrs. Wygal testified that Wolfe explained at the June or

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[4] Sanderson so testified despite admitting that he was aware of Mrs. Wygal's express concern that her son might be the victim of sexual molestation.

[5] The record reflects that the Wygals also brought the complaints of either one or two other children to the attention of the elders during the meeting in June or July of 1987. Mrs. Wygal testified that her son appeared at the meeting to confront Wolfe with the claims of a friend who asserted that Wolfe asked "to examine him" and "rubbed his back or stroked his back." Mr. Wygal testified that he told Wolfe and the elders that a young male counselee had complained to one of the Wygals' children that "Homer [Wolfe] was rubbing on him all the time." The record is unclear whether the same child made both complaints.

July of 1987 meeting that there must be a "misunderstanding," because "he was just going to take [the Wygals' child] to a book and show him what his private parts would look like if he was properly circumcised."

Mr. Wygal testified that the elders asked the Wygals in the June or July of 1987 meeting to allow the elders to investigate the situation, "[a]nd they assured us that they would take care of it." The elders had already spoken to Wolfe in April of 1986 about the need to focus on "biblical" counseling, as opposed to "professional and medical" counseling. Although Sanderson thought that the Wygals' concerns were a "family issue" and expressed that view to the other elders, Wolfe agreed in testimony that the elders instructed him on August 13, 1987, that "they wanted it clearly to be pastoral counseling and not anything in the clinical area."[6]

Still, the elders allowed Wolfe to continue counseling those persons who were, in Wolfe's words, "sensitive" or in need of "emotional stability," including the DeBose child. Wolfe asked permission from the elders to continue his counseling in this limited fashion, and remained "open about the amount of counseling that he was doing." Wolfe testified that the elders never asked him about his counseling techniques, even after the Wygals complained, and that he would have been forthright with the elders about his methods if they had.

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[6] The minutes from the elders' August 13, 1987, meeting also include a notation that the "[e]lders postponed the class taught by [Wolfe] to a later date as a result of the recent Wygal situation."

The Wygals were not satisfied when the elders concluded after the meeting in June or July of 1987 that the Wygals' complaint was simply the product of a "misunderstanding." The Wygals were also concerned that they had never heard back from the elders regarding any resolution of the complaints voiced at the meeting in June or July of 1987. As a result, Mr. Wygal shared his concerns with his teacher at the Bear Valley School of Preaching, Jack Carter, who testified that he in turn spoke with the elders about the Wygals' complaints. Mr. Carter agreed in testimony that the elders responded that they had already placed restrictions on Wolfe "in the areas of sexual activity or sexual counseling."

The Wygals remained dissatisfied with the elders' handling of their complaints. Approximately nine months after the first meeting in June or July of 1987, the Wygals met with the elders and Wolfe again in March of 1988, and discussed, according to one of the elders, "the matter of touching," "[Wolfe's] manner of hugging the [Wygal] boy," and "massaging on the [Wygal boy's] back." Mr. Wygal testified that Wolfe explained to the elders during the March 1988 meeting that it was necessary to examine the genitals of the Wygals' son because if the boy was not properly circumcised, it could cause the boy to be "easily excited sexually." However, the elders again concluded after the March meeting that the Wygals' complaints were the product of a "misunderstanding."[7]

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[7] Sanderson's testimony regarding the various meetings differed in some respects from the other testimony presented at trial. Sanderson testified that he met first with Brant and *both* Mr. *and* Mrs. Wygal. According to Sanderson, Brant approached

Nevertheless, on March 23, 1988, the elders directed Wolfe to cease his counseling efforts "for the time being effective immediately," because of the Wygals' complaints and the complaints of the parents of another young male counselee, who claimed that Wolfe was "rubbing and massaging" their child inappropriately, and that "his genitals had been handled." The elders terminated

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Sanderson after this first meeting and informed him that there "needs to be something done that would find out what was going on with Homer Wolfe." Sanderson testified that he brought the issue to the elders' attention at the elders' next meeting. Sanderson testified that the elders then scheduled a time to speak with Wolfe, and told Wolfe that they "did not want him to be involved in clinical counseling in any way." After meeting with Wolfe, Sanderson testified, "[i]t was simply left that Homer was to follow the elders wishes and get himself in – if there was anything that was an issue or a problem with him – to get it straightened out and to do what we wanted him to do." Sanderson explained that either Brant or Mr. Wygal then requested another meeting, and that a meeting subsequently occurred between Sanderson and Mr. Wygal. Sanderson did not mention whether Brant was present at this meeting and could not remember whether Wolfe was present. Sanderson was unsure as to whether Mrs. Wygal was present at his second meeting with Mr. Wygal. Sanderson then described a meeting between Mr. Wygal and the elders, but could not remember if Mrs. Wygal was present. However, Sanderson affirmatively testified that neither Wolfe nor the Wygals' son was present at the first meeting between Mr. Wygal and the elders. The elders then scheduled a second meeting with Wolfe, and that meeting ended when "Homer was reprimanded rather severely and instructed to not continue in any form of the activities that he had been in; there were to be *no* visits with anyone for the purpose of giving them any form of counseling." (Emphasis in testimony.) Sanderson did not describe any other meetings addressing the Wygals' concerns with Wolfe's counseling methods.

Wolfe's employment in early June of 1988, ostensibly due to the ineffectiveness of the Family Life Ministry and not primarily due to any allegations raised by Wolfe's counselees, because, as one elder testified, "those were allegations, and we had no concrete proof that they took place and that any type of abuse – poor judgment, yes, but any type of abuse had taken place that we could identify."

In a letter to the elders on June 4, 1988, Wolfe requested an extra month of compensation to support his job hunting efforts since he would be busy "keeping counseling appointments" during his last week on the job. The DeBose child could not remember seeing Wolfe in counseling in 1987 or 1988 specifically. However, Wolfe's own calendar shows counseling appointments with the child in January, February, March, April, and May of 1988.

DeBose and her child filed suit against Wolfe and Bear Valley in Denver District Court in 1991. After trial, a jury returned a verdict for DeBose and against Bear Valley for breach of fiduciary duty and vicarious liability. The jury returned a verdict for DeBose's child and against Bear Valley for breach of fiduciary duty, outrageous conduct, negligent hiring and supervision, and vicarious liability. The jury returned a verdict for DeBose and against Wolfe for breach of fiduciary duty. Finally, the jury returned a verdict for DeBose's child and against Wolfe for breach of fiduciary duty and outrageous conduct. On November 10, 1992, the trial court entered an amended

judgment in favor of the DeBoses, including compensatory damages, exemplary damages, and interest.[8]

On appeal, the Colorado Court of Appeals, with one of the three panel members specially concurring and one dissenting, reversed the judgment and remanded the case for a new trial. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 218, 231 (Colo. App. 1994). The court of appeals held that (1) Wolfe was entitled to a jury instruction reflecting his theory that his counseling activities were protected by the First Amendment, *id.* at 221-222, (2) the trial court erred in permitting expert witnesses to testify regarding a professional standard for pastoral counseling, *id.* at 224-28, and (3) the jury awards were either inconsistent or duplicative, *id.* at 222-24. We then granted certiorari to review the case.[9]

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[8] The judgment, as amended, awarded Denise DeBose $11,487.73 against Wolfe and $30,502.39 against Bear Valley. Wolfe was jointly and severally liable for $9,168.73 of DeBose's award against Bear Valley. The DeBose child was awarded $157,835.76 against Wolfe and $458,098.07 against Bear Valley. Wolfe was jointly and severally liable for $75,516.68 of the DeBose child's award against Bear Valley.

[9] We granted certiorari on the following issues, as reframed by the court:

1. Whether the First Amendment provides a defense to tort claims if the alleged tortious conduct is motivated by a sincerely held religious belief.
2. Whether the court of appeals erred in holding that expert testimony regarding conduct appropriate in counseling a minor was admitted in error.

II. First Amendment Issues

A. First Amendment Defense of Homer Wolfe

1.

In *Destefano v. Grabrian*, we held that when a defendant raises the Free Exercise Clause of the First Amendment as a defense, "the threshold question is whether the conduct of the defendant is religious." 763 P.2d 275, 283 (Colo. 1988) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?*, 84 Mich. L. Rev. 1269, 1302 (1986)). *Destefano* involved a Catholic priest who engaged in an adulterous relationship with a woman to whom the priest was providing marital counseling. 763 P.2d at 279. The woman and her husband asserted tort claims against the priest and his diocese. *Id.* at 277-79. We recognized that the Catholic Church requires its priests to take a vow of celibacy, a principle the defendants acknowledged in their brief by agreeing that "sexual activity by a priest is fundamentally antithetical to Catholic doctrine." *Id.* at 284. Noting that the defendants did not claim that the priest was motivated by a sincerely held religious belief to engage in an adulterous relationship with his counselee, we concluded that "[w]hen the alleged wrongdoing of a cleric clearly falls outside the beliefs and doctrine of

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3. Whether the court of appeals departed from accepted precedent in reversing verdicts where the defendants did not object to the instructions or verdict forms at trial and on appeal.

4. Whether the court of appeals erred in reversing the jury verdicts based on their form.

his religion, he cannot avail himself of the protection afforded by the first amendment." *Id.* We foresaw, however, that "[i]f the alleged conduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue." *Id.*

In *Destefano*, we reversed the summary judgment against the plaintiff on her breach of fiduciary duty claim after determining that neither the priest nor the diocese had argued that the priest's adulterous relationship with the counselee plaintiff was motivated by a sincerely held religious belief. *Id.* at 284. Similarly, we must determine as a threshold matter whether Wolfe or Bear Valley asserted a sincere religious basis for Wolfe's use of therapeutic massage with counselees.

2.

The court of appeals concluded that Wolfe summarized his massaging of counselees as "a technique based upon his desire to facilitate communication with God." *DeBose*, 890 P.2d at 221. "Given this testimony," the court determined that the trial court should have provided the jury with the following instruction:

> [T]he jurors should be instructed [on retrial] that, if Wolfe touched the minor only in the manner in which he described touching other counselees, that such touching was engaged in solely in a sincere effort to facilitate the minor's communication with God, and that Wolfe was not motivated by any personal desires, then the jury must conclude that Wolfe did not violate any fiduciary duty owed to the minor or to his

> mother nor did he engage in any outrageous conduct toward either of them.

Id. at 221-22. The court reached this holding even though the instruction Wolfe tendered at trial simply relied upon the First Amendment as a "complete defense." *Id.* at 222. The court held that the offer of the instruction "was sufficient to require the trial court to fashion a proper instruction on the subject." *Id.* (citing *Lee v. Great Empire Broadcasting, Inc.*, 794 P.2d 1032 (Colo. App. 1989)). We disagree that the trial court erred in failing to instruct the jury in the manner prescribed by the court of appeals.

Based on our review of the testimony and other evidence presented at trial, we agree with the dissent to the court of appeals' opinion that "Wolfe posited no religious basis for his massage technique." *Id.* at 236 (Davidson, J., dissenting).[10] Wolfe testified as to why he used massage techniques on counselees. He began by generally addressing "the subject of touching among human beings:"

> I believe that it is one of the best ways to communicate – of communicating your care and concern for the other person. We have been created in the image of God. God is love, and we are made in his image. Man can't function happily, none of us can, if we do not feel loved. It's one thing to tell somebody – say, I love you; it's entirely another thing to have it demonstrated in some way, and touching has always been some way of saying, I care about you, you're

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[10] We reject Wolfe's assertion that our grant of certiorari accepted as true that Wolfe had a sincere religious basis for the use of massage techniques with young counselees.

important, you're somebody, you have value, and that's something everybody needs.

Wolfe explained that the purpose of massaging a counselee "is to increase the value and the ability to communicate, both to hear and to share." Under questioning from his own counsel, Wolfe then explained why he began to massage counselees:

Q. Did you sometimes – well, I think I already established you sometimes did use massage in connection with counseling. When did you start using that practice? How did it come to your attention that it could be useful?

A. I guess it would be as my own two sons were growing up in their preadolescent and adolescent years, that they had normal problems at that age, unable to communicate and perhaps not being able to as well as they would like; and massaging their backs and legs in order to relax them, it helped a great deal in our communication. We became very close, and we're still very close today. They grew up to be fine Christian young men.

Q. Now, when you – after that experience in your own family, when – how did it come about that you began to use it occasionally in connection with counseling?

A. How did it come about?

Q. That you began to use it sometimes in counseling people?

A. Oh. Well, I find that people, were uptight and a little bit fearful of what is going on. People are, at first, in counseling somewhat

> fearful. It helps to relax them and helps them to communicate.
>
> Q. In other words, if a person in counseling seems to be having trouble telling you what's wrong or going about what's needed in order to help themselves and have you help them, you have found that on some occasions massage will cause them to relax and communicate better?
>
> A. Yes, sir, that's correct.

Wolfe also described massaging another young counselee and maintained that "the whole purpose of it was for the purpose of concentrating on communication." Similarly, Wolfe testified that he "probably" suggested to an additional young counselee that he remove his pants "because through denim jeans and hard fabrics you don't get contact, and the whole thing here is – the purpose of [massage] is to assist in communication."

Evidenced by the testimony presented at trial, Wolfe never asserted a religious belief for his utilization of massage techniques with counselees.[11] As noted in the dissent to the court of appeals' decision:

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[11] Wolfe's attorney, in the course of opening statements, explained Wolfe's use of therapeutic massage techniques in counseling in terms of wholly secular reasons:

> And Homer [Wolfe] did learn in his counseling that sometimes if a person was having trouble communicating with him, he couldn't break through the inhibitions or impediments to be able to communicate or receive communications from the counselee, he also found that hugging or massaging would sometimes be of assistance in helping people to relax and communicate. In fact, I think Homer's

According to the record, even though he claimed that he could not remember using massage on the minor plaintiff, Wolfe explained that he used massage to assist his counselees in communicating their problems to him so he could help them. Since he believed human touch to be one of the best methods of communication between people, he chose this type of massage to help counselees relax and, consequently, communicate more freely *with him.*

Thus, although his ultimate goal in spiritual counseling was for counselees to receive help from God in resolving their problems, by Wolfe's own testimony, his choice to use massage with children had no biblical, doctrinal, or spiritual basis, justification, or underpinning. Despite the religious setting, the described massage technique simply reflects Wolfe's choice of

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testimony will be that he had first discovered the success of massaging as a means of helping people to communicate when his own sons were growing up, and at times, as all adolescents or preadolescents do, go through a period of time when they may feel rebellious or dissatisfied with the acceptance of authority. And there would be times when his sons were not able to respond to efforts to discuss things and bring them out into the open, and he found that if he would massage them, it helped them to relax, and then they were able to communicate in many things that might have otherwise become problems that we hear about so much of teenagers, who not only become rebellious but would act on their rebellion. Those circumstances were averted in Homer's family, and he had a very happy married life, and his sons were happy and grew up to be happy men, who now have happy families of their own, because Homer had the wisdom to help [illegible] communicate.

> a relaxation and communication method between himself and his counselees.

Id. at 236 (Davidson, J., dissenting) (emphasis in original).[12] We agree with those observations and conclusions.

B. First Amendment Defense of Bear Valley

Regardless of any alleged religious basis for Wolfe's decision to treat young counselees with therapeutic massage, Bear Valley contends that it is entitled to First Amendment protection for its actions in hiring, supervising, disciplining and ultimately discharging Wolfe. We disagree, as did the court of appeals. *See DeBose*, 890 P.2d

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[12] In view of our determination that Wolfe never asserted a religious belief for his utilization of massage techniques with young counselees, we will not address several arguments of the parties, including whether (1) Wolfe engaged in religious "conduct" or "belief," *compare DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 220 (Colo. App. 1994) *with DeBose*, 890 P.2d at 236-38 (Davidson, J., dissenting), and any resulting implications; (2) the trial court was obligated to provide the jury with a First Amendment instruction that was not tendered by the defendants; (3) the torts of breach of fiduciary duty and outrageous conduct are religion-neutral laws according to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 876-82 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540-42 (1993), and any resulting implications; and (4) the compelling state interest test required by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1993), is constitutional and supersedes *Smith*, and if so, whether we could apply RFRA to this case retroactively, *but see Van Osdol v. Vogt*, 908 P.2d 1122, 1130 n.12 (Colo. 1996) (RFRA inapplicable to events preceding its passage).

at 221. In *Van Osdol v. Vogt*, 908 P.2d 1122, 1128 (Colo. 1996), we held that "[t]he decision to hire or discharge a minister is itself inextricable from religious doctrine." However, we took care to distinguish internal hiring disputes within religious organizations from general negligence claims filed by injured third parties:

> While Claims for illegal hiring or discharge of a minister inevitably involve religious doctrine, that is not the case for a claim of negligent hiring of a minister. The claim of negligent hiring is brought after an employee has harmed a third party through his or her office of employment. An employer is found liable for negligent hiring if, at the time of hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others. *Connes v. Molalla Transp. System, Inc.*, 831 P.2d 1316, 1321 (Colo. 1992); Restatement (Second) of Agency § 213 cmt. d (1958). Hence, the court does not inquire into the employer's broad reasons for choosing this particular employee for the position, but instead looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs. *See Moses v. Diocese of Colo.*, 863 P.2d 310, 320-21 (Colo. 1993) (holding that although courts must not become embroiled in interpreting or weighing church doctrine, a claim of negligent hiring of a minister is actionable because it does not require such interpretation or weighing of religious belief but

> instead is merely application of a secular standard to secular conduct), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994).

Van Osdol, 908 P.2d at 1132-33 n.17. As we noted in *Van Osdol*, *id.*, courts may review an injured third party's claim that a religious institution negligently hired, supervised, or failed to discharge one of its employees without implicating or running afoul of the First Amendment. *See, e.g., Moses*, 863 P.2d at 321, 329-31 ("Tenantry's Claims in this case do not involve disputes within the church. . . . ").

III. Expert Testimony Issues

The court of appeals held that the trial court erred in admitting certain expert testimony, and concluded that the admission of such testimony constituted prejudicial error. *DeBose*, 890 P.2d at 224, 228. The court determined that the tendered expert testimony was prejudicial for three reasons. *Id.* at 227-28. First, the court held that a portion of the testimony was irrelevant. *Id.* at 227. "[T]here was no evidence that Wolfe asked the minor to compare his genitals to photographs in any book. . . . At best, it related to incidents allegedly occurring during sessions with other counselees." *Id.* Second, the court determined that some of the testimony presented the jury with an inquiry prohibited by the First Amendment, i.e., "whether Wolfe's techniques were, in fact, valid from a Biblical standpoint." *Id.* Third, the court held that some of the testimony provided the jurors with professional standards for both secular and pastoral therapeutic counseling. *Id.* The court concluded that a secular standard was irrelevant in the pastoral counseling context, and that a pastoral standard impermissibly allowed the jurors to

render a decision based on "clergy malpractice." *Id.* The court also noted that the prejudicial impact of the expert testimony was "exacerbated" by the trial court's failure to instruct the jury that Wolfe might be insulated from liability pursuant to the First Amendment. *Id.* We do not agree that the trial court erred in admitting the expert testimony, and will address each of the court of appeals' concerns in turn.[13]

A.

First, the court of appeals incorrectly concluded that the expert testimony concerning Wolfe's alleged examination of a young counselee's genitals was "irrelevant." *Id.* at 227. The testimony at issue focused on the accusations of the Wygals' son. The appropriateness of the therapy techniques Wolfe used on the Wygals' son directly related to questions of (1) whether Bear Valley was on notice of alleged improprieties in Wolfe's practice but continued to allow Wolfe to see other counselees, including the DeBose child, and (2) whether Bear Valley could have prevented reasonably foreseeable harm to DeBose. *See Destefano*, 763 P.2d at 288 ("a person who knows or should have known that an employee's conduct would subject third parties to an unreasonable risk of harm may be directly liable to

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[13] In view of our resolution of this issue, we will not address the impact that the defendants' legal strategy otherwise might have on our analysis. In his disclosure certificate, Wolfe affirmatively placed the plaintiffs on notice that "[d]efendant Wolfe may call one or more experts to testify about the appropriateness of his counseling practices." Furthermore, Bear Valley's attorney specifically asked one of the witnesses in question about "standards" for "pastoral counselors."

third parties for harm proximately caused by his conduct") (footnote omitted). The DeBoses' attorney offered the expert in part as one qualified to render opinions on "responsibility of supervision in church settings and avoiding reasonable foreseeable injury." The trial court took care to preface the introduction of this testimony with extensive and repeated cautionary instructions, limiting the evidentiary use of the testimony to the relevant issue of notice as it relates to prevention of reasonably foreseeable harm:

> [DeBoses' attorney, in sidebar discussion with court]: The testimony you're about to hear may be used for the purpose of showing notice
>
> . . . .
>
> The Court: Okay. I'll make an instruction, but you can make further record if you need to.
>
> Jurors, you have already heard some references to statements or testimony of two individuals, Mr. and Mrs. Gary Wygal, W-y-g-a-l, and this witness is about to refer to statements that they allegedly made involving themselves or their children, as the case may be. This is one of those situations where evidence can be admitted for one purpose, but not for another purpose, and is an appropriate time for me to caution you about this particular type of testimony. I mentioned this yesterday as a possibility.
>
> We have two defendants in this case. We have Homer Wolfe, and we have the Bear Valley Church of Christ. There may be a time when evidence would be allowed as against one of the Defendants, but not the other Defendant. There may be a time when the evidence is allowed as

against both Defendants, but only for a specific purpose.

The Defendants dispute these so-called – using [Wolfe's counsel's] language – other acts that are alleged to have occurred or taken place by Homer Wolfe. Other acts meaning, other reportedly improper acts, which are of a nature – a similar nature as what Plaintiffs in this case assert happened. We are not here to determine whether these other acts, in fact, occurred or not. They are disputed. That is not what this case is about.

I am permitting this testimony with respect to what the Wygals informed the church about – or at least about their concerns, for the limited purpose of allowing Plaintiff to present evidence, and whether you accept or reject it is your choice, but allow the Plaintiff to present evidence that the church was aware of possible problems involving Homer Wolfe's counseling. So it is being admitted for the purpose of what the church knew and when.

It's what we call – we lawyers call a notice issue. The fact that there's testimony that these things occurred does not mean that they did, in fact, occur, because that is essentially hearsay. We don't have, for instance, I think, the son coming into court to say what did or did not happen to him. So it's important that you understand the fine evidentiary line that we are drawing here.

. . . .

. . . Again, jurors, I want to emphasize that these allegations are not being presented to you for the truth of the matter asserted. It is simply

information which was available to the church and it goes to the issue of notice, which you'll hear more about in the instructions. It is disputed whether these actions actually occurred regarding the Wygal child or children.

. . . .

[DeBoses' attorney]: Could you explain to the jury, without using any names, with the exception of Mr. Wolfe's name, how he applied [a book entitled "The Gift of Sex"] to therapy?

[Wolfe's attorney]: I object. I object on the grounds that it has to apply to [the DeBose child] or Denise DeBose in order to have any relevance to this case.

[DeBoses' attorney]: Your Honor, we're talking about the reasonableness or unreasonableness of his counseling and whether or not the Elders should have known. Your Honor, if you'll allow me to make a little bit more of a foundation.

[The Court initially sustained the objection but, after additional foundation evidence and argument, permitted Debose's attorney to proceed.]

[Mr. Schoener]: Could you restate your question? I'm sorry.

[DeBoses' attorney]: Is there anything about the way that Homer Wolfe used *The Gift of Sex* in therapy that was dangerous?

[Mr. Schoener]: Yes.

[DeBoses' attorney]: Describe that to the jury.

> [Mr. Schoener]: The notion of having people compare their genitals to those in the book to see if they've been properly circumcised, I think, is not something that's legitimate counseling or likely to be helpful. It's quite likely to be confusing and harmful, particularly in the pastoral counseling context.

The trial court took the additional step of instructing the jurors in writing at the conclusion of the case that "[e]vidence from or regarding [the Wygals' son] . . . may be considered only as evidence for the purpose of showing notice to the Church, but you should not consider it as evidence for any other purpose." Jury Instruction No. 12.

We hold that the court of appeals erred in determining that the expert witness testimony was "irrelevant" and "prejudicial" in applicable part. *DeBose*, 890 P.2d at 224-28. The notice and foreseeability issues directly related to the DeBoses' theories of the case, embodied in the court's instructions to the jury regarding the DeBoses' claim of negligent hiring or supervision:

> Negligence as to negligent hiring or supervision means a failure to do an act which a reasonably careful Church employer would do, or the doing of an act which a reasonably careful Church employer would not do, under the same or similar circumstances, to protect others from harm.
>
> . . . .
>
> The negligence, if any, of the defendant Bear Valley is not a cause of any injuries to either plaintiff, unless injury to a person in the plaintiff's situation was a reasonably foreseeable consequence of that negligence. The exact precise

> injury need not have been foreseeable, but it is sufficient if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the plaintiff's situation might result from the defendant's conduct.

Jury Instructions Nos. 18, 23. We conclude that the expert testimony concerning the Wygals' accusations was relevant and properly admitted on the question of whether Bear Valley had the requisite notice to prevent reasonably foreseeable harm to the DeBose child.[14]

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[14] Indeed, Bear Valley highlights in a brief the limited purpose, i.e., notice and foreseeability, that this testimony served in summarizing the testimony under a heading entitled "The Setting of Secular Standards for Pastoral Counseling of Minors is Barred by the First Amendment:"

> The trial court permitted the DeBoses to put on the following evidence involving the church's clergy handling activity by the Elders:
>
> Wolfe was hired by the church without adequate investigation; Wolfe was not qualified to counsel; Wolfe's methods were improper; Wolfe was not equipped to counsel emotional matters; Wolfe improperly touched people; Wolfe required a qualified supervisor; no one at the church was qualified to supervise Wolfe; the Elders' supervision resulted in harm by Wolfe; the Elders acted improperly in processing the Wygal complaint; the Elders did not investigate the Wygal complaint properly; the Elders improperly defined Wolfe's job duties; the church improperly defined the counseling service of Wolfe; the church failed to inform the congregation of Wygals' complaint; and the church failed to properly advise the congregation upon terminating Wolfe.

Answer/Reply Brief of Bear Valley at 27-28, *Bear Valley v. DeBose*, (Jan. 26, 1996) (No. 95SC42) (citations to record omitted).

B.

Second, the court of appeals incorrectly determined that some of the testimony presented the jury with an inquiry prohibited by the First Amendment. *DeBose*, 890 P.2d at 227. The court of appeals held:

> [S]ome of this testimony called into question the validity of Wolfe's beliefs concerning the efficacy of touching, which he claimed to be grounded in his religious principles. To the extent that such testimony was intended to present a jury question as to whether Wolfe's techniques were, in fact, valid from a Biblical standpoint, the First amendment prohibited its consideration for this purpose.

Id. (citation omitted). The court of appeals premised its criticism on the conclusion that Wolfe claimed a religious basis for his use of therapeutic massage with young counselees. *Id.* However, as previously noted, *supra* part II(A)(2), Wolfe never presented the jury with a religious basis for his use of massage techniques with counselees but rather explained his use of massage in terms of secular rationale. We disagree with the court of appeals because the jury never had to consider whether Wolfe's beliefs concerning the efficacy of touching were grounded in his religious principles. *See DeBose*, 890 P.2d at 227.

C.

Third, the court of appeals incorrectly held that some of the testimony provided the jurors with professional

standards for both secular and pastoral therapeutic counseling, in effect subjecting Wolfe to a claim for clergy malpractice. *Id.* The court explained:

> [T]his testimony sought to establish a professional standard for *pastoral* counseling, *i.e.*, that a minor counselee should never be touched by any counselor. And, unless the proffering of such testimony was intended to allow the jurors to determine that Wolfe violated this professional standard, it was irrelevant to any issue that they were to decide. But, to allow the jurors to assess liability against Wolfe for violating this standard was tantamount to imposing liability for "malpractice," *i.e.*, for the violation of a professional standard of conduct.

DeBose, 890 P.2d at 227. The court then noted that the trial court "exacerbated" the prejudicial impact of the expert testimony by failing to instruct the jury that the First Amendment might insulate Wolfe from liability. *Id.* Again, we disagree.

The testimony concerning Wolfe's use of therapeutic massage with young counselees was not directed toward establishing an impermissible claim for clergy malpractice. *See Moses*, 863 P.2d at 321 n.13 ("In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not.") (citation omitted). Instead, the testimony potentially supported the DeBoses' claim that Bear Valley should have been aware that Wolfe was utilizing counseling techniques with young boys that did not conform with Bear Valley's own counseling expectations. According to one of the plaintiffs' theories of the case, if Bear

Valley had notice that Wolfe employed counseling techniques with the Wygal youth that were allegedly inappropriate, the Bear Valley elders could have prevented any harm that the DeBose child experienced subsequent to the initial complaint by the Wygals. *See supra* part III(A). The trial court appropriately allowed expert testimony relating to the propriety of Wolfe's therapeutic massage technique for this limited purpose.[15]

The court of appeals also erred in analyzing the testimony of another expert witness, Reverend Marie Fortune, with regard to the incident concerning the Wygals' son. The court of appeals characterized the testimony as evidence impermissibly directed toward a professional standard of care for pastoral counselors:

> [O]ver objection, this witness was also allowed to testify that "nudity or partial nudity" is "inappropriate in the pastoral relationship." This witness said that, while such might be appropriate in either a "medical setting" or in a "situation with a licensed massage therapist," such activity is "unnecessary" and "inappropriate" in either a therapeutic or a pastoral relationship.

DeBose, 890 P.2d at 226. In fact, the relevant testimony was directly applicable to the questions of notice and

---

[15] In any case, we do not believe that the alleged error was "exacerbated" in any way by the trial court's refusal to provide the jury with an instruction regarding Wolfe's First Amendment defense. Neither Wolfe nor Bear Valley contended that the counseling techniques to which the DeBoses objected were grounded in religious belief. *See supra* part II(A)(2).

reasonably foreseeable harm. The relevant testimony reads:

> [DeBoses' attorney]: Do you have an opinion within a reasonable degree of certainty as to whether or not the Bear Valley Church of Christ failed in its supervision of Homer Wolfe in preventing reasonable foreseeable harm?
>
> [Reverend Fortune]: Yes. I think that was inadequate.
>
> [DeBoses' attorney]: Explain to the jury in what way they failed?
>
> [Reverend Fortune]: As best I can. I could tell, again, from the depositions there was no supervision of Mr. Wolfe by anyone qualified to supervise the work that he was doing. There seemed to be confusion about the nature of the work that he was doing and some concern expressed by the Elders as to whether he was overstepping his – the bounds of his job. But it seemed to me that that concern was not pursued in terms of – particularly the allegations – but it was not pursued in any way that was effectively supervising him regarding that.
>
> My other concern that has to do with both the hiring and supervision and the lack of qualifications for the job that he was asked to do. As I recall, the only reference to qualifications had to do with the fact that he had been a preacher for a number of years and that he was a former director of education at the churches he served previously. In my opinion, neither of these things qualified him for the position that he was being asked to serve in. So that, combined with lack of oversight and supervision, seemed to me inadequate.

[DeBoses' attorney]: When the allegations of [the Wygals' son] were brought to the Elders in either May or June of 1987, what should they have done?

[Reverend Fortune]: In my opinion, they should have investigated further beyond those allegations. It would have been advisable, it seems to me, for them to have suspended Mr. Wolfe's counseling work that he was doing until an investigation could have been completed, so that there would not have been any chance for further access to persons who might possibly have been harmed.

. . . .

[DeBoses' attorney]: . . . Reverend Fortune, where a minister admits to employing nudity and partial nudity in the counseling setting, is injury to the counselee reasonably foreseeable?

[Reverend Fortune]: It seems to me that it is, because that is inappropriate in the pastoral relationship.

[DeBoses' attorney]: Why is that?

[Wolfe's attorney]: Your honor, I object to the testimony about the standard of care in the pastoral relationship on the same grounds.

[DeBoses' attorney]: Your honor –

The Court: Objection overruled.

[DeBoses' attorney]: Why is that inappropriate?

[Reverend Fortune]: In my opinion there are two situations, it seems to me, in which

> disrobing is appropriate, and there may be others, but it seems to me, two. In particular, in a helping relationship where we are seeking out a professional to assist us with a particular problem. One would be a medical setting, and the other would be a situation with a licensed massage therapist.
>
> [DeBoses' attorney]: Beyond that, in any counseling – therapeutic, pastoral – relationship, disrobing is inappropriate?
>
> [Reverend Fortune]: It's unnecessary and it's inappropriate.

The plaintiffs specifically presented this witness "as an expert in theology *relative* to procedures and practices reasonably necessary in a church setting to prevent foreseeable harm." (Emphasis added.) *But cf. DeBose*, 890 P.2d at 225 (incorrectly stating that expert "was tendered as an 'expert in theology' *and* upon 'procedures and practices in church settings necessary to prevent reasonably foreseeable harm.' ") (emphasis added). Again, neither Wolfe nor Bear Valley contended that the use of nudity as a counseling technique had roots in religious belief. We do not view Reverend Fortune's testimony as directed toward a standard of care for pastoral counselors. Rather, it was properly received as relevant to notice and reasonably foreseeable harm.

IV. Inconsistent or Duplicative Jury Awards

Finally, Wolfe and Bear Valley contend that the jury verdicts were either inconsistent or duplicative. In reviewing this claim, the court of appeals acknowledged that "[t]he record here does not contain a transcript of

any discussion with respect to the instructions or verdict forms. Hence, it does not reflect any objection interposed by defendants to the verdict forms." *DeBose*, 890 P.2d at 223. Nevertheless, the court of appeals addressed the defendants' claims for the following reason:

> However, after the verdicts were received, defendants sought to have them set aside, claiming that they resulted in the award of duplicate damages. Plaintiffs have not asserted, either in the trial court or here, that defendants' failure to object to the form of the verdicts prevented them from raising this issue, and the trial court addressed the merits of defendants' assertion. We shall do likewise. . . .

Id. We disagree with the court of appeals' analysis of the record, *id.*, and conclude that the defendants did not preserve their contention adequately for appellate review.

We agree with the court of appeals that the record does not contain any evidence that the defendants entered objections to the verdict forms or instructions, prior to submission to the jury, on the basis that the instructions allowed the jury to assess inconsistent or duplicative damages. *Id.* Our review of the record indicates that the defendants raised the issue of duplicative or inconsistent verdicts for the first time in the course of post-verdict motions. However, the DeBoses responded to the defendants' post-trial contention by asserting that the defendants never raised the issue at trial, and the trial court summarily rejected the defendants' claim of inconsistent and duplicative damages in part because of the DeBoses' assertion that the defendants did not adequately preserve the issue.

In a memorandum in support of its post-trial motions,[16] Bear Valley asserted that the jury verdict forms resulted in conflicting and duplicative verdicts. Bear Valley did not assert in the memorandum that either defendant objected to the jury instructions or verdict forms prior to submission to the jury. Similarly, Wolfe filed a post-trial motion for an amendment of the judgment, claiming that the jury verdicts were duplicative. Again, Wolfe did not contend that either defendant objected to the verdict forms or instructions prior to judgment, even though his post-trial motion contained an entire section devoted to a motion for new trial based on "Defendant Wolfe's Tendered and Refused Jury Instructions." Defendant Wolfe's Post-Trial Motions at 18-19, 31-34, *DeBose v. Wolfe*, (Denver District Court, Sept. 10, 1992) (No. 91CV4346).

The defendants never argued in the district court that they objected to the verdict forms and instructions on the basis that they were inconsistent or duplicative prior to submission to the jury, and the court of appeals correctly concluded that the record does not contain any evidence of such objections. *DeBose*, 890 P.2d at 223. However, the court of appeals misconstrued the procedural history of the case in determining that "[p]laintiffs have not asserted, either in the trial court or here, that defendants' failure to object to the form of the verdicts prevented

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[16] Bear Valley filed a post-trial motion seeking, either in conjunction or in the alternative, a new trial, judgment notwithstanding the verdict, amendment of the judgment, and remittitur. In its post-trial motion, Bear Valley also adopted all of the claims that Wolfe asserted in his own post-trial motion.

them from raising this issue, and the trial court addressed the merits of defendants' assertion." *Id.* Indeed, the DeBoses responded to Bear Valley's post-trial assertion that the jury instructions and forms resulted in duplicative or inconsistent verdicts by arguing, in relevant part:

> [Bear Valley] did not argue that the verdict forms were insufficient prior to tendering them to the jury. In fact, [Bear Valley] asserted a position which required that simple verdict forms originally tendered by [the DeBoses] be revised into multiple forms with multiple sets of damage figures. [Bear Valley] then agreed to the forms as revised.

Plaintiff DeBoses' Response to Defendant Bear Valley Church of Christ's Motion for New Trial, and/or Judgment Notwithstanding the Verdict and/or Amendment of Judgment and/or for Remittitur at 8, *DeBose v. Wolfe*, (Denver District Court, Sept. 15, 1992) (No. 91CV4346) (parenthetical reference to attached exhibits omitted). The DeBoses incorporated this argument into their response to Wolfe's post-trial assertion that the verdicts were duplicative or inconsistent. The trial court, having presided over the trial and having heard any objections by counsel to the jury verdict forms and instructions, agreed with the DeBoses' response to Wolfe's post-trial argument that the verdict forms allowed for duplicative or inconsistent verdicts, and refused to address Wolfe's substantive contention in summarily denying Wolfe's post-trial motions:

> Defendant Wolfe's Post-Trial Motions are denied for the reasons previously articulated by the Court during the trial of the within action, as well as for the reasons articulated by [the

DeBoses] in their Response to Defendant Wolfe's Post-Trial Motions.

In short, contrary to the court of appeals' conclusions, the DeBoses *did* argue "that defendants' failure to object [prior to judgment] to the form of the verdicts prevented them from raising this issue," *see DeBose*, 890 P.2d at 223, and the trial court accepted that argument in denying the defendants' post-trial motions.[17]

Based on the foregoing procedural history, culled from the record before this court, we conclude that the defendants did not preserve any objections to the jury verdict instructions or forms for the purposes of appellate review. According to our rules of civil procedure, a party cannot seek appellate review of the propriety of a jury instruction unless counsel tenders such an objection prior to the court's presentation of the instructions to the jury:

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[17] The court of appeals also erred in concluding that the "[p]laintiffs have not asserted, either in the trial court or here, that defendants' failure to object to the form of the verdicts prevented them from raising this issue," because the plaintiffs did raise this objection in their briefs to the court of appeals. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 223 (Colo. App. 1994). In two separate documents filed with the court of appeals prior to its decision, the plaintiffs responded to the defendants' duplicative damages claim by arguing that "[n]one of the instructions concerning damages or the verdict forms were objected to by either Defendant." [Plaintiff DeBoses] Answer Brief to Defendant-Appellant Homer Wolfe at 37, *DeBose v. Wolfe*, (Colorado Court of Appeals, June 4, 1993) (No. 92CA001929); [Plaintiff DeBoses'] Answer Brief to Defendant-Appellant Bear Valley and Opening Brief on Cross Appeal at 44, *DeBose v. Wolfe*, (Colorado Court of Appeals, May 14, 1993) (No. 92CA001929).

> All instructions shall be submitted to the parties, who shall make *all* objections thereto *before* they are given to the jury. *Only the grounds so specified* shall be considered on motion for a new trial or on appeal or certiorari.

C.R.C.P. 51 (emphasis added). Relying on C.R.C.P. 51, we have stated that "[c]ounsel has the duty to examine the instructions, and his failure to detect errors and call the trial court's attention to them ordinarily operates as a waiver of the objection." *Scheer v. Cromwell*, 158 Colo. 427, 429, 407 P.2d 344, 345 (1965) (citing *Gilligan v. Blakesley*, 93 Colo. 370, 380, 26 P.2d 808, 812 (1933)); *accord, e.g., Blakesley*, 93 Colo. at 380, 26 P.2d at 812 ("[I]t is the duty of counsel to examine – or at least to listen to the reading of – the instructions at the time they are given; and, by not detecting errors promptly and not calling the trial court's attention thereto, so as to enable the appropriate correction to be made, the point must ordinarily be deemed waived."). As we noted in *Cromwell*, "[t]he 'contemporaneous objection' rule has a salutary purpose in the orderly administration of justice. Its principle is to enable trial judges to clarify or correct misleading or erroneous instructions before they are given to a jury, and thereby prevent costly retrials necessitated by obvious and prejudicial error." *Cromwell*, 158 Colo. at 429, 407 P.2d at 345 (citing *McDonald v. Jarka Corp.*, 144 F.2d 53 (2d Cir. 1944); *United States v. Monroe*, 164 F.2d 471 (2d Cir. 1947)).

We do not believe that this is one of the "rare" cases, where equitable concerns might warrant appellate review despite the lack of a contemporaneous objection to the jury instructions. *See Cromwell*, 158 Colo. at 429-30, 407 P.2d at 345. The trial court specifically cautioned the

jurors to avoid duplicative damages by the written jury instructions:

> The plaintiffs have sued for the same or similar injuries and losses on different claims for relief.
>
> . . . .
>
> If you find for a plaintiff on more than one claim for relief, you may award damages only once for the same injuries.

Jury Instruction No. 51A (as amended by the trial court in answer to a jury communication during deliberations). The verdict form for the DeBose child's negligence claim against Bear Valley also contained the admonition that the jury must "not include an award for damages for which [the DeBose child] has been compensated under any other theory." Similarly, the verdict form for the DeBose child's outrageous conduct claims against both Wolfe and Bear Valley contained two separate warnings that the jury could "not include damages which you have assessed under another theory of recovery." The jury also received like warnings under two claims that it rejected on statute of limitation grounds. As noted in the dissent to the court of appeals' opinion, "[t]he jury must be presumed to have understood and followed the court's instructions." *DeBose*, 890 P.2d at 239 (Davidson, J., dissenting) (citing *Schmutz v. Bolles*, 800 P.2d 1307, 1315 (Colo. 1990)); *accord, e.g., People v. Smith*, 620 P.2d 232, 239 (Colo. 1980); *James v. James*, 85 Colo. 154, 165, 274 P. 816, 820 (1929). The trial court recognized this proposition in granting the DeBoses' "Request for Entry of Judgment,"

when it again rejected the defendants' post-trial duplicative damages argument and held that "the jury was specifically instructed that it could not award duplicate damages, and it must be presumed the jury followed those instructions and determined damages accordingly." (Citing *Roberts v. C & M Ready Mix Concrete Co.*, 767 P.2d 769 (Colo. App. 1988); jury instruction citation omitted.) In view of these explicit jury instructions, we see no need to consider whether an equitable exception to the contemporaneous objection rule is warranted or even allowed under our rule of civil procedure that requires a party to enter any objections to jury instructions prior to the jury's receipt of those instructions. *See* C.R.C.P. 51.

V.

Aside from the aforementioned issues, the court of appeals concluded that the evidence was sufficient to sustain the jury verdicts. *DeBose*, 890 P.2d at 218, 221. For the foregoing reasons, we reverse the judgment of the court of appeals and remand with instructions to reinstate the judgment of the trial court, entered on the verdicts of the jury.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC42
CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA1929
DISTRICT COURT, CITY AND COUNTY OF DENVER, 91CV4346

ORDER OF COURT

BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE, and J.D.B. a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

Upon consideration of the Petitions for Rehearing filed by Homer Wolfe and Bear Valley Church of Christ in the above cause, and now being sufficiently advised in the premises

IT IS ORDERED that said Petitions for Rehearing shall be, and the same hereby are, DENIED.

BY THE COURT, EN BANC, JANUARY 13, 1997.

cc:

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Honorable Herbert L. Stern, III
Denver District Court
City and County Building
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Denver, CO 80202

Clerk of Denver District Court
City and County Building
1437 Bannock Street
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Patrick H. Stanford, Clerk
Colorado Court of Appeals

VERDICTS

	Homer Wolfe	Bear Valley Church
1. Denise DeBose		
A. Breach of Fiduciary Duty	35%	65%
Past economic	$ 1,102.50	$ 2,047.50
Past non-economic	971.25	8,803.75
Future economic	2,275.00	4,225.00
Future non-economic	2,187.50	4,062.50
Sub-Total	$ 6,536.25	$ 12,138.75
(Vol. 1 @ 540-541)		
B. Vicarious Liability	N/A	Yes
(Vol. 1 @ 567)		
C. Outrageous Conduct	N/A	Statute Lim Bars
(Vol. 1 @ 568)		
D. Negligent Hiring/Supervision	N/A	Statute Lim Bars
(Vol. 1 @ 559)		
E. Exemplary Damages	$ 2,319.00	$ 4,306.00
2nd Sub-Total	$ 8,855.25	$ 16,444.75
2. John DeBose		
A. Breach of Fiduciary Duty	34%	66%
Past non-economic	$ 8,879.44	$ 17,236.56
Future economic	40,401.86	78,427.14
Future non-economic	3,836.22	7,446.78
Sub-Total	$ 53,117.52	$103.110.48
(Vol. 1 @ 571-572)		
B. Negligent Hiring/Supervision	N/A	4%/96%
Past non-economic		$ 16,847.04
Future economic		59,957.76
Future non-economic		7,278.72
Sub-Total		$ 84,083.52
(Vol. 1 @ 574-575)		
C. Outrageous Conduct	$ 23,397.00	$ 28,764.00
(Vol. 1 @ 580-581)		
D. Vicarious Liability	N/A	Yes
(Vol. 1 @ 566-567)		
E. Exemplary Damages	$ 50,500.00	$ 80,625.00
2nd Sub-Total	**$127,014.52**	**$296,583.00**
(Vol. 1 @ 577-578)		
GRAND TOTAL	**$135,869.77**	**$313,027.75**

GRAND TOTAL BOTH PLAINTIFFS **$432,452.77**

Questions in our minds about the behavior of Homer with our son.

1. Why the explaination of the private parts of the human body (male & female)?
2. Why the expl. of beastiality?
3. Why the unusual method of touching (not used with Gary or I)?
4. Why the strong intrest in the relationship with Gary Don and his friend (girlfriend)? Does he normally show that much intrest in the relationship of the members children?
5. Why did he ask to see Gary Don for counselling in the first place?
6. Why the discussion of Gary Don's own private parts???
7. Why discuss beastiality & not homosexuality (the more prevalent problem in our country & even this city)?

We just cannot understand how

a person can say + do these things without other motives than teaching a child about sex. This definitely is not the teaching method of a Christian parent. Not this pair of Christian parents anyway. And besides that, we <u>never</u> mention anything to Homer about Gary Don having a problem in that area! If he had asked we would have told him that he has <u>no</u> problem + we definitely wouldn't have had him do + say the things he did.

From the hand of two very confused + frustrated parents.

APPENDIX E

Minutes: Elders Meeting on August 13, 1987

Present: Harry Denewiler, John Gibbs, Sandy Sanderson, Jim Stigers and Jerry Taylor
Chairman: H. Denewiler
Prayer: Sandy Sanderson

Business Agenda

1. Homer Wolfe

   Purpose of Meeting – Evaluate/Discuss/ Redirect the work of Family Ministry at Bear Valley Church of Christ.

   1. Great concern Homer Wolfe activity into clinical activities with persons in the obvious needs of counseling. Elders instructed H.W. to cease in this activity.

   2. Reorganize direction of Family Ministry. A major discussion point – pastoral counseling – eliminate clinical; communication a major obstacle.

   3. Question – is the Family Ministry area of work contributing to the current needs of the BVC of quality to continue the work. H.W. given the assignment to develop and bring to the elders a new plan as *he recommends* for BVC for the reorganization. His plan to be proposed @ meeting September 2nd, '87.

   4. H. W. instructed to get his participating act together to blend, contribute and resolve the difference in working relationship w/BVC ministers Cauder & Clark. Become a "team member".

Homer Wolfe teaching @ BOBBJ

1. Elders postponed the class taught by H.W. to a later date as a result of the recent Wygal situation.

Homer Wolfe . . . reported baptism following brief study – Tim Habacker. Just released prison Las Vegas, New Mex. Called from bus station en route to previous home. Had been studying (self)

Closing Prayer – Jackie Gibbs

Minute Recorder – Sandy Sanderson

Adjourned: 11 p.m.

APPENDIX F

March 23, 1988

PLAINTIFF'S EXHIBIT 16

Suspension of Counseling

Bro. Homer Wolfe
2707 S. Lamar Street
Denver, CO 80227

Dear Bro. Wolfe:

Due to the recent turn of events, the elders deem it admissible that all of your counseling appointments be suspended and put on hold for the time being effective immediately.

Please continue in your other areas of work and we will discuss with you at a later date the reinstatement of your counseling schedule.

We appreciate your time, patience and concern in working through the recent situation.

Very truly yours,

Jerry W. Taylor
For the Elders

APPENDIX G

PLAINTIFF'S EXHIBIT 17

June 4, 1988

To The Elders:

First, let me assure you that the following is being written without any animosity in my heart whatsoever, so please do not read any of that into it.

After much thought and prayer concerning our situation, I sincerely feel that your request for my resignation is unfair. I have worked hard in performing the duties for which I was hired*; I have cooperated with the other ministers in their requests for help; I have respected the elders; I have kept a Christian spirit in the face of false accusations; I have been faithful to the Word, setting a good example for others; I have encouraged the faint-hearted and been a source of strength to many; I have loved the people and have put my whole heart and soul into my work. The good I have done for individuals and for the church as a whole cannot be measured by human standards. I cannot believe that God is pleased with the termination of such an effective work through which He has brought healing to so many damaged souls.

Because of the above, I feel that I do not have any valid reason for resigning. It is not my intention to cause

---

* Quote:

"III. *PRIORITY* will be given to:

A. Personal guidance for individuals and families having immediate problems.

B. Pre-marital counseling."

you any problems. It is simply a matter of being truthful, and I cannot conscientiously say that I am in agreement with your decision.

Since I have had to be quiet and "go about business as usual" this last week (Keeping counseling appointments and a pre-scheduled Singles-Again workshop on Saturday evening) – This, added to a two-week vacation, would only give me five weeks for job hunting. So I feel that the extra month's compensation is only fair and reasonable. (Please remind Clif that my severance compensation includes health insurance.)

With best wishes,

/s/ Homer
Homer Wolfe

APPENDIX H

DEFENDANT'S EXHIBIT Z-1

Case #91CV4346

One of the major areas of responsibility or accountability of the elders in any congregation is the on-going evaluation of the various ministries and work programs within which the church is engaged. The criteria used to evaluate such ministries or work programs may include the financial obligation of the church, the overall contribution of the ministry to the congregation totally, the growth and/or effectiveness of the program over the years and the response and/or support of the congregation as a whole to the particular program or ministry.

Obviously as we evaluate an area of work relative to either expansion or elimination, we realize that in a congregation the size of Bear Valley the decision of the elders will not always be popular or favorable with all members; however, it is with the best interest of the congregation in mind that we must, on occasion, make a decision that may be unpopular with some, but is in the best interest of the congregation at large.

While it is difficult to evaluate some areas of our work, we have over the past year, given a fair evaluation and appreciation to a major area of work within which we are currently engaged . . . The Family Ministry. While the intent is not to eliminate this particular area of work, the elders have reached an agreement to eliminate the full time staff position currently held by Bro. Homer Wolfe, as Family Minister. This decision comes after several meetings with Bro. Wolfe in reference to his work assignment and evaluation of the total Family Ministry program.

As a direct result of our meeting on Thursday evening May 26, Homer Wolfe will vacate his position effective immediately.

(Closing comments on wishing Homer and Helen well and express appreciation to them for their work at Bear Valley)

May 29, 1988

Supreme Court, U.S.
F I L E D
APR 21 1997
CLERK

No. 96-1605
No. 96-1637

In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,
a non-profit Colorado corporation,
Petitioner,

v.

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, and HOMER WOLFE,
Respondents.

HOMER WOLFE,
Petitioner,

v.

DENISE DeBOSE, JOHN DEBOSE, and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,
Respondents.

On Petitions For Writ of Certiorari To The Supreme Court of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

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31 pp

QUESTION PRESENTED

Whether a church organization or its minister is exempt from tort liability for secular conduct that does not burden the free exercise of religion, and no record evidence indicates that the petitioners' tortious conduct was rooted in any religious belief.

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OPINION BELOW

The opinion of the Colorado Supreme Court (Pet. App. A to Bear Valley's petition) affirming a jury verdict in favor of respondents Denise DeBOSE and J.D.B. is reported at *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996). The Colorado Supreme Court denied Petitions for Rehearing on January 13, 1997. Pet. App. B.

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. Sec. 125(3), through two separate Petitions, 96-1605 and 96-1637.

STATEMENT OF THE CASE

Respondents, Denise DeBose and J.D.B., filed suit against the Bear Valley Church of Christ ("Bear Valley") and Homer Wolfe ("Wolfe"), a Bear Valley minister. Their claims against Wolfe included breach of fiduciary duty, and outrageous conduct based on the minister's sexual touching of minor child J.D.B. that grew out of Wolfe's counseling of the child. Their claims against Bear Valley included breach of fiduciary duty, outrageous conduct, and negligent hiring and supervision based on the antecedent knowledge of Bear Valley that Wolfe had sexually approached other

vulnerable children. The tortious conduct aggravated preexisting physical and emotional conditions causing the DeBoses to become ill.

The jury returned verdicts of breach of fiduciary duty against both petitioners and for both respondents. In addition, verdicts of outrageous conduct and negligent hiring or supervision were returned for the minor child, as set forth in Pet. App. C to Bear Valley's petition. The jury also found that the statute of limitations on the negligence claim had expired as to Denise DeBose.

The facts underlying the DeBoses' claims are recounted in the opinion of the Colorado Supreme Court, Pet. App. A at 2a-10a. The DeBoses incorporate those facts by reference. No evidence connected touching genitals or rubbing thighs with religious motivation.

Four sets of facts alleged by Bear Valley in its petition are incorrect.

First, at page 5, Bear Valley quotes at length J.D.B.'s testimony that he did not recall seeing Wolfe in 1987 or 1988, and apparently extrapolates from that testimony an incorrect "fact" that no counseling sessions, and therefore no sexual contact, occurred in those years. Bear Valley ignores the undisputed evidence of others, including Wolfe, that he counseled the child with increasing frequency into 1988. Wolfe's calendar (Trial Exhibit 9) recorded 1988 sessions as twice in January, twice in February, three times in March, three times in April and once in May.

Second, at footnote 6, Bear Valley contends that the minor child alleged "only one incidental contact with his genitals." The record is exactly the opposite. As set forth in pages 3a-4a of Pet. App. A, at trial the child related that Wolfe regularly "would rub my leg up to my side and just touch my penis" and his "privates." Bear Valley's claim at footnote 6 that the boy's comments to Dr. Henry Frey, a psychiatrist who conducted an independent examination for Bear Valley, was "180 degrees" different from the child's testimony at trial is also inaccurate. J.D.B. told Dr. Frey that Wolfe required him to take his shirt off, and that Wolfe's rubbing of the child, including under his shorts, was "like caressing." XIII:142. Dr. Frey never asked the child where Wolfe had touched him, and J.D.B. did not volunteer that information to Dr. Frey.

Third, Bear Valley's assertion at page 28 that there were no allegations of misconduct against Wolfe before he was fired in 1988, is in error. In its minutes of April of 1986, the elders questioned Wolfe's "medical counseling." Ex. 4a Tab 5(l). In addition, in June of 1987, Gary and Mary Wygal told the elders directly that Wolfe had asked their fourteen year old son to expose his genitals to Wolfe during counseling. VIII: 9-12. Through 1987, Wygal continued to complain to the elders about Wolfe's unusual touching of children. VIII: 35-40. In early 1988, another father, Owen Dean, told the elders that his son had been inappropriately touched by Wolfe. XII: 30. After talking with the boy, the Wygals told the elders that Wolfe had asked to physically examine David Dean, and wanted "to get into his (Dean's) pants with his hands." VIII: 27-28; 186.

Fourth, Bear Valley claims that it discontinued Wolfe's counseling of children in March of 1988, when a letter was sent to Wolfe to that effect. The elders did nothing to tell the congregation of the suspension. XII:169 and XIII:110. The elders almost immediately reinstated his counseling duties without investigation, and children including DeBose continued to receive counseling from Wolfe through June of 1988. IX:99-100.

Facts alleged by Wolfe in his petition are also incorrect.

First, at page 10, Wolfe says that he has always maintained that "any touching of John DeBose was religiously motivated." In fact, both before and during trial, Wolfe denied ever touching J.D.B. The massage that he described giving other children, according to Wolfe, was aimed at communication. However, as to J.D.B., the following question and answer were given at trial by Wolfe:

Q. Didn't you massage that boy?

A. I did not.

XIII:53: ll. 2-3. Wolfe testified specifically that he would not have massaged J.D.B. because it would not have provided any benefit to the boy. XIII:48.

Second, at page 6, Wolfe claims that, at trial, he "explained the religious underpinnings" of the techniques which he employed for inspection of the genitals of adolescent counselees. Wolfe cites 13:53:ll.7 - 54:ll. 5. The testimony referenced by Wolfe has nothing to do with

religious support for his technique of inspecting the genitals of adolescent counselees. Following is the testimony which Wolfe cites to explain his "religious underpinning":

> Q With Wade Wright, how did it come up to check Wade's circumcision? Did he bring it up?
>
> A. During the massage period I was talking to him constantly, and the whole purpose of it was for the purpose of concentrating on communication, and he was about to leave town. I wanted to have one last encouragement session to encourage him. He was a very good boy. I had a lot of respect for him. He had a great future ahead of him. I just wanted to talk to him about living a good Christian life, staying close to God, and talk to him about -- talk to him about dating, talk to him -- I don't remember the specifics. All of it was about things that would occur to him in connection with dating, and I urged him to watch out for the normal temptations.
>
> Q. And that's how checking his genitals -- to encourage him to watch out for temptations?
>
> THE COURT: You need to speak up a little bit, sir.
>
> A. There were occasions that it might be helpful for me to explore that part of his area of his life.
>
> Q. The genital area of his life? What area of his life were you exploring by checking his genitals.
>
> A. His sexuality and development sexually.

Wolfe's own citation to the record shows that he never posited a religious belief for the nudity and massage that he employed in counseling of Wade Wright or any other child.[1]

The Colorado Supreme Court determined that the evidence at trial was sufficient to support the DeBoses' claims for breach of fiduciary duty, outrageous conduct, and negligence in hiring and supervision.

The Colorado Supreme Court found that neither Wolfe nor the Bear Valley Church of Christ had asserted at trial that the tortious conduct complained of -- *i.e.*, Wolfe's touching of the genitals of J.D.B. and Bear Valley's decision to keep Wolfe's methods secret from the congregation, were motivated by any religious belief.

Rather, Bear Valley argued that the First Amendment to the United States Constitution prohibits subject matter jurisdiction where clergy hiring and supervision are involved, which argument was rejected by the Colorado Supreme Court. Homer Wolfe similarly argued that the First Amendment to the U. S. Constitution prohibits subject matter jurisdiction where the clergy provided counsel to a parishioner, which argument was also rejected by the Colorado Supreme Court.

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[1]Wade Wright testified that Wolfe "felt my penis and genitals" for 20 to 30 seconds and that Wolfe "said that the doctors did a good job in circumcision." X:13, 18.

REASONS FOR DENYING THE PETITION

I. This case is not worthy of certiorari review because the Colorado Supreme Court's holding is consistent with this Court's well-established precedents.

The decision of the Colorado Supreme Court in this case raises no unsettled issue of federal law. The Colorado court followed well-settled decisions of this Court in holding that laws burdening conduct not proven to be rooted in religious belief do not violate the First Amendment's free exercise clause.

Neither the Church of Christ nor Homer Wolfe can argue that the Colorado Supreme Court ought to have examined evidence concerning the actual impact of tort liability on religious belief: Such weighing of evidence in this case is impossible because neither the Church of Christ nor Wolfe presented evidence showing whether and how their tortious conduct was required by their specific religious belief. The argument at trial, rather, was much as it is to this Court: Religious organizations and their ministers should be exempt from tort liability.

A. The Colorado Supreme Court followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion.

The Church of Christ has never provided record evidence or even specific allegations showing that its tortious conduct was rooted in any religious belief. Similarly, Wolfe has never provided record evidence or specific allegation showing that his tortious conduct was rooted in any religious belief. He claimed generally that his counseling was "biblically based", but failed to provide any religious motivation for the techniques that he used. Based on this record, the Colorado Supreme Court applied well-settled law to hold that the judgment in this case did not burden the free exercise of religion. This holding is consistent with every decision by this Court. It also raises no important or unsettled principle of constitutional law. Therefore, this Court should deny both Bear Valley's petition and Wolfe's petition.

This Court has long held that conduct is not "exercise of religion" unless the conduct is mandated by sincerely held religious belief. *See, e.g., Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989)(to prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)(law does not burden free exercise rights unless it has a "tendency to coerce (Homer Wolfe and the Bear Valley Church) into

acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987)(burdened conduct must be "mandated by religious belief" to be protected by free exercise clause)(quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)("to have protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The party claiming a constitutional violation has the burden of proving that violation. Neither Bear Valley nor Wolfe have shown that conduct at issue was religious. Under all of this Court's well-established free exercise precedents, the First Amendment provides no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief." *Hobbie*, 480 U.S. at 141. The Church of Christ and Wolfe have the burden of proving with record evidence that tortious conduct and religious belief are "inseparable and interdependent." *Yoder*, 406 U.S. at 215.

Bear Valley's claim at page 14 of its petition, that "the Colorado Supreme Court has entirely disregarded this (the compelling state interest) test," is inaccurate. The first question to be asked in deciding whether or not to consider applying a compelling state interest test is whether the conduct at issue is motivated by a religious belief. *Yoder, supra*, 406 U.S. at 215. Because neither Wolfe nor Bear Valley asserted religious motivation for the tortious conduct at issue, the Colorado Supreme Court properly held that there was no basis on which to consider a compelling state interest analysis. Pet. App. A, 11a-12a. The essence

of Bear Valley's argument is that, because it is a religious organization, everything it does must be motivated by religious belief. There is no testimony that the specific tortious conduct complained of -- Bear Valley's decision to keep secret from the congregation that their minister had been accused of sexually abusing children; the decision to tell those accusing the minister to keep the secret in order to allow Bear Valley to control the information; the decision to allow the minister to continue his methods without supervision and without investigation -- were motivated by any religious belief. Bear Valley's antecedent knowledge of the danger posed by Wolfe, not any religious belief, provided a basis for the tort claims against Bear Valley.

Moreover, mere assertion that a law burdens some practices that might conceivably be religious has never sufficed to show a violation of the free exercise clause. The party asserting a defense based on the free exercise clause has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief. *Yoder*, 406 U.S. at 215. *See* also *Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820 (10th Cir. 1988)(free exercise clause challenge to zoning ordinance requires "evidence in the record" that location of church "is integrally related to underlying religious beliefs.") The Free Exercise Clause of the First Amendment does not grant churches immunity from being sued in civil courts. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U. S. 619 (1986).[2]

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[2]Assuming the Church of Christ or Wolfe had established religious motivation, the free exercise clause would not bar Colorado from

The Church of Christ reliance on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993), at pages 14 through 16, and Wolfe's reliance on the same case at page 16 of his petition, are misplaced. In that case, there was no question but that the conduct at issue was religiously motivated -- record evidence showed that the conduct being regulated involved a specific religious ceremony. The question then turned to whether the law at issue was aimed at prohibiting that specific religious practice, which it clearly was. Equating a municipal ordinance specifically designed to prevent a religious practice with the neutral application of common law is nonsensical. In *Church of Lukumi*, this Court noted that the inquiry to determine whether a law was neutral is whether the "object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 2227. If the answer is "yes", the law is not neutral and requires a compelling state interest test. The object of the torts of negligence and breach of fiduciary duty is to provide compensation to plaintiffs injured by the tortious conduct of another. The torts are religion neutral and, even assuming the conduct at issue had been tied to religious belief, the First Amendment would be no defense pursuant to *Smith.*

At pages 19 and 20, the Church recasts DeBoses' claims into claims in which a civil court decided selection of clergy. The recasting is inaccurate. Consistent with federal and Colorado law, DeBoses' verdicts did not intrude into

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enforcing generally applicable religiously neutral rules that prohibit or burden even religiously motivated conduct. *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

the clergy selection process. They addressed only the decision by the Chruch of Christ to retain Wolfe in a position where he was given intimate access to young children in a counseling setting, when the Church had been directly told that his history placed those children at risk. By way of analogy, the same analysis would have applied if the Church had allowed Wolfe to drive buses filled with parishioners in situations where the Church knew that Wolfe had a history of driving carelessly. Freedom to select clergy is protected. Decisions by a religious employer to allow clergy involved in secular conduct to harm unsuspecting third parties, is not protected.

At pages 11 through 15 and 25-26 of the Bear Valley petition, the Church criticizes the Colorado Supreme Court generally for perceived internal inconsistencies in cases which that court has decided. A review of the cases cited shows that the Colorado court carefully and appropriately decided the cases cited by Bear Valley. *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996), involved a minister who sued her church concerning her ministry. The Colorado Supreme Court held that the choice of minister is protected. Nothing in that decision runs contrary to this Court's jurisprudence, or to the Colorado Supreme Court rulings in *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993), *cert. den.*, ____U.S. ____, 114 S.Ct. 2135 (1994), *DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) or *Bohrer v. DeHart*, ___ P.2d ___ (Colo. App. 1996). In distinguishing the negligence claims from internal church conflicts, the *Van Osdol* court stated in footnote 17:

> "(T)he court...looks to whether the specific danger which ultimately manifested itself could have

> reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs."

Indeed, in *Bear Valley*, there was no inquiry into religious beliefs at either the trial or appellate stages of the action.

Bear Valley contends at page 8 that the State of Colorado is required to restrict its breach of fiduciary duty claim to claims involving financial affairs. Wolfe's petition mirrors that claim at page 27. The essential premise of the argument is that when a clergyman is sued for breach of fiduciary duty other than conduct involving taking money, it is his status as a clergyman which gives rise to the fiduciary duty. This premise was directly addressed in *DeStefano* and in *Moses*. When applying the neutral common law tort of breach of fiduciary duty, the relevant inquiry is "not the profession of the defendants. The relevant facts are that the defendants . . . occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty." *Moses, supra*, footnote 13.[3]

Since neither defendant presented evidence that the conduct at issue was mandated by a religious belief, the argument about the minister's status is irrelevant. In fact, the record actually shows that Homer Wolfe's conduct was contrary to the church's religious beliefs, as discussed in

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[3]The briefs by both Bear Valley and Wolfe allege that the Colorado Supreme Court erred when it decided the *Moses* case. This Court declined to review the decision of the Colorado Supreme Court in that case in 1994 at 114 S.Ct. 2153.

I(B)(i.), *infra*. However, assuming that Bear Valley or Wolfe had shown that a minister's status required him to abuse children, the result here would be the same because the torts at issue are neutral laws of general applicability. The Colorado Supreme Court has recognized that, under appropriate circumstances, a clergyman may, but need not be, in a position of trust, just as, depending upon the circumstances, a wide range of persons may seek positions of trust. *See, Moses, supra*, and *DeStefano, supra.* The "status" involved is not clergy or non-clergy; it is a person in authority who seeks a special trust such that another has the right to rely on the fiduciary.[4]

The torts at issue are neutral laws of general applicability, both on their face and in their application. It is not the status of "minister" that creates the duty, it is the act of a person in a position of superiority offering help to a person who is vulnerable such that the person in the position of superiority assumes a duty to act in good faith. An identical result would have been reached in this case if the Church had been a non-religious employer, such as a day care center or a hospice, whose dangerous employee

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[4]At pages 11 and 12, Bear Valley cites a variety of Colorado cases which hold that, where a professional negligence claim is based on exactly the same evidence as a breach of fiduciary duty claim, the two claims are duplicitous. The same cases are cited by Wolfe at page 28 of his petition. In *Crystal Homes v. Radetsky,* 895 P.2d 1179 (Colo. App. 1995), an attorney's fiduciary obligations were based entirely on his attorney-client relationship; in both *Awai v. Kotin*, 872 P.2d 1332 (Colo. App. 1993) and *Spoor v. Serota*, 852 P.2d 1292 (Colo. App. 1992), *cert. denied* (1993), the doctor's fiduciary obligations were based entirely on his doctor-patient relationship. Those cases are irrelevant to the issues raised here.

provided damaging care or counseling to a vulnerable person.

None of the claims were predicated on actions motivated by religious belief. The negligence claim was based on prior notice to the Church of the danger Wolfe posed; the breach of fiduciary duty claim was based, not on how Wolfe was treated, but on how the DeBoses were treated by entities that sought and then betrayed their trust; the outrageous conduct claims were based on damaging actions taken with full knowledge of the vulnerability of the DeBoses.[5]

The holding by the Colorado Supreme Court in *Bear Valley* is consistent with every decision of this Court. It presents no unsettled or important questions of federal law. Therefore, the petition of the Bear Valley Church of Christ should be denied.

B. Because neither Bear Valley nor Wolfe presented record evidence concerning how

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[5]Wolfe claims at page 28 that the outrageous conduct tort stems from Wolfe's status as a clergyman. The jury instruction is included in Exhibit Z to Wolfe's petition. In fact, the tort is independent of Wolfe's status as a minister. In counseling both Denise DeBose and her son, Wolfe learned that J.D.B. had been abused before the child began counseling and that the child had emotional problems. As the instruction reads: "The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity." Wolfe's actions based on his knowledge of the frailties of both J.D.B. and Denise DeBose, not based on any ministerial status, formed the foundation of the outrageous conduct liability.

tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the actual impact of tort liability.

The Colorado Supreme Court correctly posed the threshold question for any defense predicated on the free exercise clause: Did Wolfe or Bear Valley assert a religious basis for their tortious conduct? Bear Valley's Pet. App. A, 11a-12a. Based on the trial court record, the court concluded that neither Bear Valley nor Wolfe had ever articulated how specific tortious actions were motivated by a deeply held religious belief. At pages 14 and 15, Bear Valley criticizes the Colorado Supreme Court for failing to apply a compelling state interest test where neither Bear Valley nor Wolfe provided evidence on which to apply the test, as was their burden.

i. Bear Valley presented no evidence that its tortious conduct was religiously motivated.

At page 23, Bear Valley claims, for the first time in this litigation, that "laying on of hands" is a "sacred communication of pastoral counseling." At every level of the litigation in the lower courts, Bear Valley has contended that any touching by Wolfe of counselees was not motivated by nor part of any religious belief held by Bear Valley. Indeed, at trial, Bear Valley claimed that it ordered Wolfe to refrain from "medical counseling" after it learned that Wolfe had been checking the genital development of boys. One elder testified that Bear Valley "absolutely" did not

approve of Wolfe's methods (XII:23) and that Wolfe had not raised a religious belief when the elders told Wolfe to stop touching children. Wolfe simply agreed to stop. XII:31. That elder testified that Wolfe's counseling should not have included "any type of physical activity that would require looking, discussing, anything to do with the young man's personal development . . .". XII:49. Another elder testified that Wolfe's counseling was to have been limited to spiritual counseling and that the allegations of physical contact made against Wolfe were outside of Bear Valley's beliefs. XII:80-82. In contrast to claims made by Bear Valley in the lower courts, Bear Valley's current claim that the "laying on of hands" justified Wolfe's conduct, hints, but never says directly that the "laying on of hands" has a religious motivation and would, in some undefined way, extend to "laying hands" on the genitals of children.

Testimony given in the trial court is not the only arena in which Bear Valley condemned Wolfe's conduct as totally unrelated to any religious belief of Bear Valley. In its Opening Brief to the Colorado Supreme Court, Bear Valley asserted repeatedly that the elders ordered Wolfe to refrain from the clinical counseling because it was inconsistent with its religious beliefs.

Bear Valley presented no evidence that any of the specific tortious actions complained of against Wolfe or Bear Valley were either mandated by or prohibited by their religion. There is no religious mandate about keeping secret sexual abuse by its ministers. There is no mandate or prohibition about deceiving and manipulating vulnerable parishioners. In place of a specific articulation of how the acts complained of were mandated by a religious belief,

there is a presumption that, because Wolfe is a minister and Bear Valley religious organization, all actions are religious.

There is no claim anywhere in the record that a religious belief involving "laying on of hands" mandated Wolfe's conduct. Even Wolfe has never raised such a religious mandate. Because of lack of proof that the tortious actions were motivated by religious belief, the Colorado Supreme Court properly found that Wolfe's and the Church's First Amendment defense was merit less.

Because Bear Valley has not alleged -- let alone proven -- that specific tortious acts were "mandated" by religious faith, it has not properly alleged a defense to tort liability under the First Amendment. Specifically, it has never argued at trial or in any of the briefs that its religious faith requires it to (1) authorize ministers who required children to undress and reveal their genitals to provide counseling to psychologically vulnerable parishioners; or (2) allow such ministers to engage in touching the thighs, backs and genitals of minor parishioners.

The Church has never articulated a religious motivation or substantial burden to exercise of religion that could provide the prerequisite of the compelling state interest analysis it requests.

ii. Wolfe presented no evidence that his tortious conduct was religiously motivated.

Unlike Bear Valley, which defended its actions at trial based on Wolfe's conduct being at odds with its

religious belief, Wolfe himself was silent about motivation for his actions, beyond claiming that his counseling was "biblically based," without ever referencing how partial or total nudity, massage or examination of genitals were mandated by any religious belief.[6] He identifies some conduct that may have been religious. The tortious actions at issue, however, were not. Wolfe claims that everything he does is religious conduct; everything he believes is a religious belief.

Wolfe testified that he learned the techniques of touching, not from any religious dogma or text, but from using massage techniques on his sons to help them communicate. Pet. App. A, 14a. He testified that he learned his theory behind having counselees take off their clothing, not from any religious dogma or text, but from a book, *The Gift of Sex*. IX:75-76.

At Wolfe's Appendices E through N, he attaches every pre-trial motion and argument in which he claimed that the First Amendment prohibited subject matter jurisdiction. Never once did he raise a religious basis for his actions. Prior to trial, Wolfe listed 14 affirmative defenses. None concerned any alleged religious motivation for touching children.

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[6]Any biblical basis for Wolfe's techniques was never shared with the parents of the children he touched. He claims that his non-disclosed, post lawsuit-professed beliefs allowed him to touch children without consent of parents and without any authentic consent from the children because of their age.

Wolfe was told in 1988 by the elders to stop touching the "Dean boy." He stopped and asserted no burden to his beliefs. Nothing in the record suggests that his touching of J.D.B. was more religious than his touching of the "Dean boy." Free exercise defenses to common law liability are necessarily dependent on specific facts developed at trial, and the burden of proving with record evidence that the tortious conduct and religious belief are interdependent is with the entity asserting the defense. *Yoder*. 406 U.S. at 215.

Whether Wolfe's beliefs were religious is a legal question to be determined by the court. *United States v. Seeger*, 380 U.S. 163 (1965). Because there was no evidence that the touching, massage and fondling of J.D.B. by Homer Wolfe was motivated by any deeply held religious belief the trial properly made that determination as a matter of law.

As Wolfe states in his petition, he presented no record evidence to the Colorado Supreme concerning a religious mandate for his conduct. In place of record evidence, Wolfe asked the Colorado Supreme Court to treat as a "given" that his tortious conduct was religiously motivated,[7] which the Colorado Supreme Court refused to do.

---

[7]Wolfe raises The Religious Freedom Restoration Act , 42 U.S.C. Sec. 2000bb (1993). As discussed above, Wolfe has raised no religious belief which could form the basis of the compelling state interest test required by RFRA. Accordingly, RFRA is facially inapplicable.

The Colorado Supreme Court properly denied certiorari review on the Establishment Clause of the First Amendment, which denial is criticized generally by Wolfe in his petition. Resolution of this case did not require interpreting and weighing of church doctrine, but rather allowed application of neutral principles of law to determine the liability of the Church. In other words, the Colorado Supreme Court determined that the burdens imposed by tort liability in this case had not been shown to be burdens on anything but secular conduct.[8]

II. The Expert Witness Testimony did not Address Religious Beliefs.

The testimony concerning Wolfe's use of touching and nudity supported claims by the DeBoses that the techniques employed by Wolfe were harmful and inappropriate in any counseling setting. That testimony had nothing to do with questioning dogma, particularly where Bear Valley agreed that the techniques were outside of the expectations of the elders.

Bear Valley misunderstands the testimony of the four experts that are listed at page 26 . Bear Valley says that the first expert, Marie Fortune, was tendered as an "expert in theology." Bear Valley fails to set out the limitation on that

---

[8] The Colorado Supreme Courts' holding is consistent with this Court's jurisprudence in *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

expert qualification. Rev. Fortune was qualified "as an expert in theology relative to procedures and practices reasonably necessary in a church setting to prevent foreseeable harm." As the Colorado Supreme Court noted, plaintiff was required under the negligence claim to prove that Bear Valley's supervision of Wolfe caused foreseeable harm. The testimony discussed that foreseeability and had nothing to do with religious beliefs.

The second listed expert, psychiatrist Dr. Morall, gave no opinions on standard of care or on religion. Rather, she testified that it was harmful to remove the shirt of a counselee, remove the pants of a counselee, or rub the thigh of a counselee (VII:75) -- none of which were arguably dictated by any religious belief. Indeed, Bear Valley's own expert, Dr. Frey, testified to the same predictable harm.

The third expert, Randy Sims, the Church of Christ therapist appointed by the elders, testified that the boy had been badly hurt. In addition, after Wolfe had suggested a "biblical basis" for his touching and nudity, without itemizing that basis, Sims rebutted that suggestion, which was consistent with all of the testimony presented by Bear Valley that there was no religious basis within the Church of Christ that justified touching the genitals of children.

The fourth expert, Gary Schoener, did not discuss dogma or philosophy. As Schoener testified, the problem of sexual abuse by clergy in counseling settings is pervasive and non-denominational. VII:57. The expert testimony to which Bear Valley objects provides nothing more than a statement of the position that the elders repeated during

trial. Wolfe had no medical credentials or training which qualified him to touch the genitals of children. Bear Valley reiterated that position at trial, but is critical that witnesses for the Deboses testified to it.

As the Colorado Supreme Court notes at page 21a, the trial court took care to preface the introduction of expert testimony with repeated cautionary instructions limiting the evidentiary use of the testimony. The only questions about general standards of pastoral care posed to any witness, were asked by the defense. VII:150 ll. 23-25; VII:151: ll. 1-12. Likewise, the only questions about religious dogma or philosophy were asked by the defense. VII:162: ll. 10-13. No witness was tendered to render opinions of standard of care. VII:46; VIII;52; XI:11-13.

CONCLUSION

The Colorado Supreme Court's decision correctly applied the legal standards as set forth in decisions by this Court by applying uncontroversial, universally accepted principles of constitutional law. Therefore, this Court should deny the petitions of the Bear Valley Church of Christ and of Homer Wolfe.

Respectfully submitted,

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No. 96-1605

In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,
a Colorado non-profit corporation,

Petitioner,

v.

DENISE DEBOSE, and J.D.B., a minor child,
by and through his parent and next friend,
Denise DeBose,
and
HOMER WOLFE,

Respondents.

Petition For A Writ Of Certiorari
To The Supreme Court Of Colorado

PETITIONER'S REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF THE CASE

Respondents' allegation in paragraph one " . . . antecedent knowledge of Bear Valley that Wolfe had sexually approached other vulnerable children," repeated on page 10 is specifically denied by the Bear Valley Church of Christ, as the only "antecedent knowledge" held by the church up and through the time of the discharge of Homer Wolfe as a minister at the church was the written concern of Mr. and Mrs. Wygal, which does not support the position that "Wolfe had sexually approached other vulnerable children," See Petition, Appendix D, pages 42 through 43.

Respondents' Brief, beginning at page 2, states that facts in the Petition of the church were incorrect in four specific areas. Each will be addressed.

First, the point in the Petition was that J.D.B. did not recall seeing Wolfe in 1987 or 1988, not an effort to claim he may not have seen Wolfe in those years for counseling. The point of the Petition statement was that all J.D.B.'s statements concerning the conduct of Wolfe in counseling with him related therefore to events before 1987. J.D.B.'s own testimony was "after I went – I started going to Deer Creek, I don't, I don't remember seeing him much after that." He started attending Deer Creek in 1987 pursuant to his own testimony. The Wygals first raised their concern in June 1987.

Second, the record does not support Respondents' statement that there was more than one incident of contact claimed by J.D.B. of his genitals by Wolfe. J.D.B. did not allege his genitals were touched when his mother spoke to him in June 1988 about Wolfe's counseling. J.D.B. did not claim he was touched on the genitals in his three or four counseling sessions with Randy Simms in June 1988. J.D.B. denied under oath in his deposition in this case of January 3, 1992 that touching of the genitals had occurred and he testified in his deposition his thigh had been rubbed only once. The first mention of touching his penis was to Dr. Kathy Morall, a psychiatrist hired by the DeBoses for trial, who saw J.D.B. once on April 9, 1992. However, J.D.B. never mentioned this inflammatory fact to Dr. Frye on April 6, 1992, April 7, 1992, or April 10, 1992, when

seen at the request of the church. At trial, J.D.B. testified to his counsel's questions:

> "Q. John, do you remember telling Kathy – Dr. Morall that Homer Wolfe touched your privates?
>
> A. Yes.
>
> Q. Was that true?
>
> A. Yes.
>
> Q. Explain to the jury what you told Dr. Morall.
>
> A. He would just rub my leg up to my side and just touch my penis and then . . . " (this is the complete answer given).
>
> V.8:114:15-22.

Dr. Kathy Morall testified to J.D.B. counsel's questions:

> "Q. What did he tell you?
>
> A. . . . But he indicated that after the second or third visit that Mr. Wolfe had asked him to remove his shirt, that there had been some back rubbing, that he had asked him to sit on his lap, and that, again, he would stroke his body, and that *on at least one occasion he massaged and stroked his thigh and also touched his penis.* He said privates." (emphasis supplied) V.8:59:5, 18-24.

J.D.B. also testified at trial, when under cross-examination concerning his group counseling sessions instituted after January 3, 1992:

> "Q. Do those other kids talk about some very serious things that have happened to them?
>
> A. Yes.
>
> Q. And you believe that has helped you remember more about your sessions with Homer?
>
> A. Not really that, but it was just – I remember some of the stuff for the trial and stuff.
>
> Q. Who has talked to you about the visits of Homer Wolfe?
>
> A. Just my lawyer.
>
> Q. Just your lawyer. How about your mother?
>
> A. She just talked to my lawyer first, I guess.

Q. Okay. Your mother hasn't talked to you about the visits with Homer Wolfe?

A. After she talked to my lawyer, she –

Q. Excuse me, I didn't hear the last part.

A. She would talk to me, I guess. I wouldn't talk back because you don't –

Q. You don't speak back to your mother?

A. No, not a whole lot.

Q. You just listen to what she has to say?

A. Yes." V.8:132:1-22.

Dr. Frye testified on direct at trial:

"Q. In other words, your last visit with John was the day after he had seen Kathy Morall?

A. Yes.

Q. And at that time he revealed nothing about having – his penis having been touched?

A. That's correct. And I believe I opened my third session with the way I usually begin a final meeting with someone I'm evaluating – I'm reading from my own notes – any points – 'Are there any points you want to talk about?' Again, implying we met twice; did we leave something out that is a telling, important matter that you wish to bring to my attention. Again, this would be John or any person I'm evaluating. And John's answer was, I'm upset because I have to go to court because Homer Wolfe touched – rubbed my back and legs. I don't think Homer was – really was a trained counselor to want to touch people and so forth, which I said before. He did not bring up a new piece of information, even in the face of my asking him open-ended questions in that final meeting.

And toward the end of that final session, again, before we closed up, as I would always do, I wanted to see if there's anything we may have overlooked. And my final – I asked: 'Are there things that make you sad?' Again, the very open-ended question that could bring up whatever was left that may still

> wasn't – hadn't been touched. And John's answer was, 'Moving to Nebraska; leaving my friends in Denver; my grades, although I'm doing better this year. I'm doing that because I want to do better with my life and not be a bum.' That's what I was trying to find earlier in my testimony." V.13:174, 1-25:175, 1-6.

Third, Respondents' allegations of known "misconduct" against Wolfe before he was fired in 1988, is a totally unfair characterization of facts. The Respondents' mention of the brief April 1986 discussion of the Elders with Wolfe involving "medical counseling" before the Wygals' concern over "medical counseling" does not equate to "misconduct." "Medical counseling" is not ipso facto improper sexually motivated activity.

Attached to the Petition as Appendix D is the very document given to the elders in June 1987 by Mr. and Mrs. Wygal. It should be noted item six on Appendix D states: "6: Why the *discussion* of Gary Don's own private parts? (emphasis supplied)

However, by the time of the depositions of Mr. and Mrs. Wygal on March 5, 1992, which was the testimony read to the jury over the defendant's objections, it became the following:

> "Q. And you indicate that had Mr. Wolfe asked to – what did you say he asked your son?
>
> A. He asked to see – *he asked to examine* my son to see if he was properly circumcised.
>
> Q. Your son told you that?
>
> A. Yes.
>
> Q. You told the Elders?
>
> A. Pardon me. My son told my wife, and my wife told me this.
>
> Q. Then did you and your wife relate that to the Elders at some point?
>
> A. Yes." (emphasis added) V.8:11-12:17-25, 1-3.

Note that in their original written concern in 1987 it was a "discussion" of private parts and by the time of the deposition in 1992, some almost five years later, it had become "examine," and this was admitted into evidence based on double hearsay.

Four, Respondents allege the Elders did not really suspend the counseling of Wolfe. In the Petition at Appendix F is the letter suspending Wolfe's counsel on March 23, 1988 written by Elder Jerry W. Taylor. Wolfe testified at the time of trial on Plaintiffs' counsel's questions:

> "Q. Mr. Wolfe, haven't you said that Harry Denewiler (Elder) told you you could keep counseling?
>
> A. As I recall, I communicated with him after receiving the letter that that would be unfair to some of my clients, that they were desperately in need of the help, that they would be badly harmed if we discontinued suddenly without a good cause and asked if he would ask the Elders to consider allowing me to continue with some of my people with hard-core problems.
>
> Q. People with hard-core problems?
>
> A. First time I ever thought of it in those terms. People that were sensitive and needed some emotional stability.
>
> Q. And they agreed to do that?
>
> A. Yes, they did." V.9:99, 12-25:100, 1.

Respondents' Brief also brings up the testimony allowed over objection by trial court and approved by the appellate court and Supreme Court of the State of Colorado of Wade Wright. Wade Wright came forward in December 1989, one and one-half years after Wolfe was discharged by the Elders. Wright claimed he had counseled with Wolfe for one hour in 1981 or 1982 at age 12, following his 12 year old cousin's death. He alleged Wolfe had him remove his shirt and pants, then lay down on the floor, while Wolfe massaged his arms, back and legs. Wolfe also allegedly checked his circumcision. Wright told no one about this counseling session for over ten years, despite the fact his grandfather was a church Elder.

Page six of the Respondents' Brief establishes the alleged grounds upon which they claim a right of avoidance of the First Amendment by alleging the case is grounded against the church on their "decision to keep Wolfe's methods secret from the congregation." However, claims made against the church

were actually upon theories of negligent hiring, negligent supervision, breach of fiduciary duty and vicarious liability by way of ratification. There was no "decision" to keep Wolfe's counseling methods a secret from the congregation. The Elders discussed the Wygals' concerns with Wolfe and spoke to adults such as Magyar, who were counseling with Wolfe.

REASONS FOR GRANTING THE WRIT

I. This case cries out for certiorari review because the Colorado Supreme Court opinion is not only inconsistent with this Court's prior pronouncements, but a multitude of other jurisdictions who have considered this very issue. Further, this issue is being litigated with ever-increasing frequency in state and federal courts.

In the very recent decision on April 4, 1997 of the Supreme Judicial Court of Maine, in the case of *Swanson v. The Roman Catholic Bishop of Portland, et al.*, ___ A.2d ___ (Maine 1997), 1997 W.L. 19707, the court found it unconstitutional to bring a claim of negligent supervision against a church when it was presented for the first time with the question of whether courts may constitutionally impose and enforce a duty of an employee's supervision derived from secular agency principles against a religious organization.[1] The facts of the case are remarkably similar to those in *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 2153 (1994), which was discussed and soundly rejected by the Maine Court. Just as the Respondents in this case claim, plaintiffs in the *Swanson* case alleged that the claim for negligent supervision against the church could be resolved by the application of neutral tort principles. They argued that inquiry into the church's knowledge of the risk presented by the priest and the reasonableness of the church's

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[1] The Superior Court of Maine had dismissed the claim against the church for negligent selection and training of the priest, but had denied the motion to dismiss the claim for negligent supervision.

supervisory acts involved nothing beyond the application of secular legal standards to secular conduct. The Maine Court pointed out: " . . . Clergy members cannot be treated in the law as though they were common law employees," and concluded that

> " . . . On the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the matter deemed proper by the ecclesiastical authorities and was not a societal interest sufficient to overcome the religious freedoms inhibited."

In the case of *Roman Catholic Bishop v. Superior Court,* 50 Cal. Rptr. 2d 399 (Cal. App. 4th Dist. 1996), the California Court on a writ of mandamus granted the church's motion for summary judgment on the basis (1) the child failed to establish the church could have uncovered any facts that would have shown an undue risk of harm the priest would commit criminal child sexual abuse if he were employed by the church (one of the church's positions in the present case in response to the alleged standard set forth in *Van Osdol v. Vogt,* 908 P.2d 1122 (Colo. 1996) by the Colorado Supreme Court at footnote 17. However, in this case the Supreme Court of Colorado has entirely failed to follow its own pronouncement.); (2) the church could not have required the priest to review his prior sexual behavior under his rights of privacy; and (3) the church had no civil duty to supervise the priest's vow of celibacy, which is a religious duty. [This is contrary to the very basis of the Colorado Supreme Court's first case holding in *Destafano v. Grabrian,* 763 P.2d 275 (Colo. 1988).]

In *Sanders v. Casa View Baptist Church,* 898 F. Supp. 1169 (N. D. Texas 1995), the church was granted summary judgment regarding a minister's improper sexual conduct with two women on claims of infliction of emotional distress, breach of fiduciary duty, negligence in hiring, retention and supervision, as well as Title VII retaliation and sexual harassment claims.

The effect of the First Amendment religious clauses on a church's tort liability for out of course and scope activity of clergy in sexual misconduct is an area of litigation which is prolifigating across all jurisdictions, the majority of which have taken the position of the Petitioner in this case before the Court. This Honorable Court accepting certiorari will result in the settling of the law across all jurisdictions and save vast amounts of judicial time, as well as that of potential litigants involved in the issue.

A. The Colorado Supreme Court's opinion in this case invades religious beliefs and practices, not secular conduct.

The Respondents in this case base their claim against the Bear Valley Church of Christ on the premise the religious belief and practices involved of the church were not religious, but were secular conduct. The conduct of the church involved in this case was the hiring, supervision, disciplining and discharge of clergy, its intermediary between man and God, and having this intermediary between man and God conduct the sacred communication of pastoral counseling. The mere boldface claim of the Respondents that these activities of the church are not religious activities generated by a religious belief and then labeling their second-guessing of the church conduct as tortious conduct is extremely transparent on its face. A church's dealings with their canonical appointment and subsequent acts of its intermediary between man and God and in having this individual conduct the sacred communication of pastoral counseling is, per se, the exercise of religion based on sincerely held religious belief. The Respondents' attempt to relabel these events is a sham and subterfuge to avoid the First Amendment and avoid the previously pronounced decision of this Honorable Court which have been honored in the majority of jurisdictions to consider the issue, but not in Colorado.

The Respondents' many statements that there was no inquiry into religious beliefs in this case ignores that the Respondents were allowed in the trial to question the adequacy

of the Elders' knowledge of Wolfe's background when appointing him, to question the qualifications of Wolfe to conduct the sacred communication of pastoral counseling, to claim Wolfe's methods of pastoral counseling was below the standard for secular counseling, to question the right of the Elders even to permit pastoral counseling by Wolfe, to question the right of Wolfe to touch people in pastoral counseling, to claim a clergy person must be supervised in conducting pastoral counseling, to claim the Elders as mere lay persons were not, by experience and education, qualified to supervise Wolfe in pastoral counseling, to claim the Elders' supervision of Wolfe in pastoral counseling was a direct cause of injury of the minor, to claim the Elders did not conduct a proper investigation of the Wygal concerns, as the Respondents' hindsight dictated, to claim the Elders' job description for Wolfe as intermediary between man and God could be second-guessed by the Respondents, to claim the Elders did not properly define the sacred communication of pastoral counseling for Wolfe, to claim the Elders were required to immediately destroy Wolfe as an effective counselor in the church by informing the entire congregation of the Wygals' concern at the very outset of its receipt and to claim the Elders were required upon the ultimately forced discharge of Wolfe to air the full particulars of their dissatisfaction with Wolfe to the entire congregation. This gambit of conduct by the Respondents as permitted by the Colorado courts in the trial of this case invaded and mutilated the religious beliefs and practices of the Bear Valley Church of Christ and they do not disappear by the mere statement of the Respondents that they did not take place.

II. Contrary to the Colorado Supreme Court and the Respondents in this case, the Colorado Court of Appeals found the Respondents' expert witnesses invaded religious beliefs.

The Colorado Court of Appeals, as set forth at pages 26-27 of the Petition found that the expert witnesses the trial court permitted to testify on behalf of the Respondents questioned the validity of Wolfe's beliefs concerning the efficacy of

touching as grounded in religious principles. The Colorado Court of Appeals also held the experts allowed establishment of a "professional standard for pastoral counseling, i.e., that a minor counselee should never be touched by any counselor" and was tantamount to imposing improper liability for "malpractice" for violations of a professional standard of conduct.

CONCLUSION

This case presents to the Supreme Court of the United States an opportunity to brightline its position concerning the effect of the First Amendment on churches and to outline the proper procedure for dealing with the claims against a church concerning allegations of a clergyman's sexual misconduct, which will be of great benefit to the multitude of jurisdictions which are being faced with this issue in an ever increasing number.

Dated this 5th day of May, 1997.

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In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,

Petitioner,

v.

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, DENISE DeBOSE, and HOMER WOLFE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE NATIONAL BAPTIST CONVENTION OF AMERICA, INC., CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, CONSERVATIVE BAPTIST ASSOCIATION OF AMERICA, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, WISCONSIN EVANGELICAL LUTHERAN SYNOD

AND

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER BEAR VALLEY CHURCH OF CHRIST

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE NATIONAL BAPTIST CONVENTION OF AMERICA, INC., CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, CONSERVATIVE BAPTIST ASSOCIATION OF AMERICA, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, WISCONSIN EVANGELICAL LUTHERAN SYNOD

Pursuant to Rule 37 of the Rules of this Court, National Baptist Convention of America, Inc., Christian Reformed Church in North America, Conservative Baptist Association of America, International Church of the Foursquare Gospel, and Wisconsin Evangelical Lutheran Synod respectfully move the Court for leave to file Brief of Amici Curiae in the above entitled cause. Counsel for Denise DeBose and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, has not replied to movants' letter requesting consent. All other parties have granted their consent and their letters accompany this motion.

All of your *amici curiae,* except the Wisconsin Evangelical Lutheran Synod, are major denominations with a membership in excess of 5,190,065 who along with their member bodies and Wisconsin Evangelical Lutheran Synod are directly threatened by the decision of the Supreme Court of Colorado.

The issues presented in the instant case are a matter of continuing importance to *amici curiae.* First, is the issue of freedom to determine one's own organizational and relational structure without regard to secular or other religious bodies. Second, is the issue of freedom from liability for secret, unauthorized conduct of one in authority in a religious body that is an anathema to the

beliefs, teachings, and exhorted practices of the body. *Amici curiae* offer an analysis of relevant court decisions on how these issues are to be tried and decided that is not found in the petitions for writ of certiorari of Bear Valley Church of Christ and Homer Wolfe. The failure to properly analyze and apply the relevant court decisions has caused the Colorado courts to misapply breach of fiduciary duty, negligent hiring or supervision and outrageous conduct in this case to Bear Valley Church of Christ. Therefore, the petitions for writ of certiorari do not adequately represent the interests of *amici curiae.*

For the above stated reasons, *amici curiae* respectfully urge the Court to grant this motion for leave to file the *amici curiae* brief in support of Petitioner Bear Valley Church of Christ.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

This case presents vital issues affecting the fundamental rights of every religious body. The first issue is the freedom to determine one's own organizational and relational structure without regard to secular or other religious bodies. The second issue is the freedom from liability for secret, unauthorized conduct of one in authority in the body that is an anathema to the beliefs, teachings and exhorted practices of the body. Causes of action for breach of fiduciary duty, negligent hiring or supervision and outrageous conduct have been wrongly applied in this case to make Bear Valley Church of Christ a victim of conduct, which if it did occur, the church should not be liable.

Amici Curiae National Baptist Convention of America, Inc., Christian Reformed Church in North America, Conservative Baptist Association of America, International Church of the Foursquare Gospel, and Wisconsin Evangelical Lutheran Synod are major denominations with a membership in excess of 5,190,065 who along with their member bodies and Wisconsin Evangelical Lutheran Synod are directly threatened by the decision of the

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[1] Counsel of record for all parties except one have consented to the filing of this brief and, pursuant to Rule 37, those letters of consent have been filed with the Clerk along with a motion for leave to file this brief.

No counsel for any party authored any portion of this brief. Except for a monetary contribution to a portion of the cost to prepare this brief paid by Church Mutual Insurance Company of Merrill, Wisconsin, this brief was paid for by members of Amici Curiae or their counsel.

Supreme Court of Colorado. This brief is not to be interpreted as any expression of approval of whatever conduct Homer Wolfe did or the way the elders handled the situation.

SUMMARY OF ARGUMENT

The liability imposed on Bear Valley Church of Christ is the result of the Colorado courts having failed to properly analyze when tort theories of liability are inapplicable to a religious body either because of the religion clauses of the First Amendment or the theories have no legitimate application to it. The testimony received at trial upon which liability was based is contrary to *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929), and *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 107-08 (1952).

ARGUMENT

I. PROPER ANALYSIS IS ESSENTIAL TO DETERMINE WHEN A RELIGIOUS BODY IS OR IS NOT CONSTITUTIONALLY OR OTHERWISE LAWFULLY PROTECTED FROM TORTIOUS CONDUCT OF ONE IN AUTHORITY ACTING IN AN ECCLESIASTICAL CAPACITY IN AN ECCLESIASTICAL ACTIVITY.

The First Amendment through the Fourteenth Amendment is applicable to tort litigation brought by private litigants. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). Therefore, tort litigation in state court cannot

do what the state itself is prohibited from doing by legislative or other action, according to *Sullivan*. 376 U.S. at 265.

In order to perceive the flawed reasoning of the Supreme Court of Colorado and the lower courts in this case, it is necessary to begin with a correct analysis for determining when a religious body is or is not entitled to constitutional or other lawful protection from tortious conduct injuring another person[2] by one in authority acting in an ecclesiastical capacity in an ecclesiastical activity. While the constitution should never be a shield to protect a religious body from conduct for which it is indeed responsible, the body likewise should never be deprived of that protection or other lawful protection through the application of secular or religious standards of negligence that impose responsibilities inconsistent with the ecclesiastical structure and functioning of the body. Therefore, those occasions when a religious body is properly liable will be addressed first in order to facilitate understanding when it is not liable and why.

Tortious or criminal conduct of one in a position of authority is either authorized or unauthorized. If it is authorized, the body is properly liable. If it is unauthorized, the body may be liable provided it has

---

[2] The nature of the tortious conduct that is the subject of this brief is physically abusive or immoral in character which is continuous or is likely to be repeated. This brief will not address liability of a religious body for conduct such as driving a church vehicle in violation of traffic laws, failing to supervise children's activities at camp or similar activity, or failing to correct known property defects that result in injury or death.

breached a standard of care applicable to it. It is this framework that will be used to determine legitimate liability of a religious body for one in authority in light of the First Amendment and applicable tort law.

A. Religious Body Liability For Authorized Conduct

Religious conduct that violates criminal law is never protected. *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 166-67 (1878). Similarly, any religious conduct that threatens public safety, peace or order is not entitled to protection either. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1944); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Thus, when one in authority carries out any religious teaching or practice of the body like these, the body is properly liable. *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 762 P.2d 46, 60 (Cal. 1988), cert. denied, 490 U.S. 1084 (1989); *Van Schiack v. Church of Scientology of California, Inc.*, 535 F.Supp. 1125, 1135 (D.Mass. 1982).

B. Religious Body Liability For Unauthorized Conduct

Turning to conduct of a religious body that is contrary to its beliefs, teachings and practices, there are several situations where the body is liable for the conduct of one in authority and neither the First Amendment nor legitimate application of tort law is violated. Each of these situations assumes the religious body has no ecclesiastical structural or relational impediment to do what is described. The first is where the body with the power of

appointment knows that one under consideration for a position of authority has engaged in the conduct, yet makes the appointment. *Doe v. Redeemer Lutheran Church*, 531 N.W.2d 897, 902 (Minn. 1995). The second is like the first except the person is already in a position of authority when the body with the power of removal learns of the conduct, but fails to remove or deny this person the opportunity to repeat the conduct while acting in the position. *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 812-13 (Minn. App. 1992). The third is where a reasonable background check prior to placing one in a position of authority would have revealed this kind of conduct, but it was not done. *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991). The fourth is where the body with the power of removal and investigation receives credible information that one in authority is guilty of this conduct, but it is not investigated. *Doe v. Redeemer Lutheran Church*, supra. Finally, there is the situation similar to the last one where credible information is received, an investigation confirms the information, but no steps are taken to prevent the conduct. *Doe v. Redeemer Lutheran Church*, supra.

C. Limitations On Liability Of Religious Body For Unauthorized Conduct

Liability in each of the preceding situations cannot be based on the religious criteria or methodology of the body for placing or continuing one in an ecclesiastical position nor on the application of secular or religious standards to it. *Gonzalez v. Roman Catholic Archbishop*, supra; *Kedroff v. Saint Nicholas Cathedral*, supra; *Serbian*

Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *Byrd v. Faber*, supra. The following language from *Byrd* explains what must be done to avoid these intrusions:

> Specifically, the plaintiff must plead facts which indicate that the individual hired had a past history of criminal, tortious, or otherwise dangerous conduct about which the religious institution knew or could have discovered. . . .
>
> . . .
>
> While even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire [or continue] someone who it knows is likely to commit criminal or tortious acts, the mere incantation of an abstract legal standard should not subject a religious organization's employment policies to state scrutiny.

565 N.E.2d at 590.

If a theory of liability does not fall into one of the preceding categories, it either will violate one or both of the religion clauses of the First Amendment or will fail in a necessary element of liability. For example, vicarious liability whether it is called respondeat superior or agency requires proof that the conduct of the one in authority must be in the course and scope of the duties in furtherance of the ministry of the body. *Dausch v. Rykse*, 52 F.3d 1425, 1435-36 (7th Cir. 1994); *Strock v. Pressnell*, 527 N.E.2d 1235, 1244 (Ohio 1988). But, conduct contrary to the beliefs and teachings of the religious body is in the language of *Dausch*, "a deviation" from the duties of the appointment and "not in furtherance" of the ministry. 52 F.3d at 1429. Statements that tortious conduct occurring

within the general scope of the authority are sufficient to establish vicarious liability is pure fiction to reach a result against a religious body. The fiction may be appropriate for secular businesses that receive a benefit from the conduct[3], but this is certainly not the case for a religious body due to the damage inflicted on its reputation. Regardless of whether one in authority is in a secular business or religious body "independent self-serving acts" are a departure from the responsibilities of the position, thus negating any liability of the principal, according to *Byrd*. 565 N.E.2d at 588.

Claims of negligent ordination or negligent placement in a position of ecclesiastical authority involving any evaluation of the ecclesiastical procedures are blatant violations of both religion clauses of the First Amendment. *Gonzalez v. Roman Catholic Archbishop*, supra; *Kedroff v. Saint Nicholas Cathedral*, supra; *Serbian Orthodox Diocese v. Milivojevich*, supra; *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490, 507 (1979); *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985); *Simpson v. Wells Lamont Corporation*, 494 F.2d 490, 493-94 (5th Cir. 1974); *Schmidt v. Bishop*, 779 F.Supp. 321, 324 (S.D.N.Y. 1991). See also Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981). Because an ecclesiastical appointment is, in the language of Gonzalez, "a canonical Act, it is the

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[3] In Byrd, the court observed that an employer might be liable for an intentional tort where an employee injured an unruly patron of the business because it did not facilitate the peaceful operation of the business. 565 N.E.2d at 587.

function" of the religious body making the appointment "to determine what the essential qualifications . . . are and whether the candidate possesses them." 280 U.S. at 16. This process of selecting ecclesiastical authorities is "said to have federal constitutional protection," according to *Kedroff*. 344 U.S. at 116. Or, as well stated in *Rayburn*:

> [I]ntroduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.

772 F.2d at 1169-1170. Therefore, to require a religious body appointing a person to an ecclesiastical position to do more than an ordinary background check to discover prior criminal or tortious conduct would result in attempting to "foster excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971).

Likewise, negligent supervision or retention claims encounter a host of constitutional problems if the theories previously outlined seek to impose secular or religious standards on the body. *Serbian Orthodox Diocese v. Milivojevich*, supra; *Simpson v. Wells Lamont*, supra. This Court pointedly wrote in Milivojevich that personnel decisions by a religious body that are attacked in civil suits would require either a "generic" standard of care to be used by all religions in hiring and firing their ecclesiastical leaders or an application of the canonical laws of the religious body as the court sees proper, neither of which can escape the prohibitions of the First Amendment. 426

U.S. at 713. Since the relationship between an ecclesiastical leader and a religious body is, according to *Simpson*, the "life blood" of the body:

> The interaction between the church and its pastor is an integral part of church government. . . . The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern . . .
>
> The values underlying these two provisions [of the First Amendment] relating to religion have been zealously protected, *sometimes even at the expense of other interests of admittedly high importance*. . . . (Emphasis added.)

494 F.2d at 493-94. The argument that an ecclesiastical leader is comparable to a common law employee was very well met by the district court in *Schmidt*, to wit:

> Furthermore, any inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises the same kind of First Amendment problems of entanglement discussed above, which might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. *Insofar as concerns retention or supervision, the pastor of a Presbyterian Church is not analogous to a common law employee.* He may not demit his charge nor be removed by the session, without the consent of the presbytery, functioning essentially as an ecclesiastical court. *The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation.* Church governance is founded in scripture,

> modified by reformers over almost two millennia. . . . *It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination,* a result violative of the text and history of the establishment clause. U.S. Const. Amend. I. (Emphasis added.)

779 F.Supp. at 332. It is the unimaginable variety of structure and governance of religious bodies that makes it unconstitutional to impose any generic or religious standards on them for supervision and removal. *Serbian Orthodox Diocese v. Milivojevich,* supra.

Pastoral counseling is as fundamentally religious as delivering a sermon to the congregation or teaching a class. *Dausche v. Rykse,* supra. No better expression of this has been stated than that in *Dausch,* to wit:

> In most, if not all, religious traditions, pastoral counseling – advice on matters of spiritual growth or moral responsibility – requires a great deal of knowledge and skill with respect to human psychology. Yet, as Illinois and, indeed, every state that has confronted the issue have noted, such pastoral counseling is clearly and directly centered on matters of religion, and claims of negligence are not cognizable in the civil courts.

52 F.3d at 1433. It is so integral a part of the free exercise of religion that every jurisdiction recognizes a pastor-parishioner privilege grows out of it. No state thus far has sought to regulate it by licensing. The qualifications

for religious counseling by necessity must be determined by the religious body and, therefore, cannot serve as a basis for any civil litigation. *Gonzalez v. Roman Catholic Archbishop of Manila*, supra; *Serbian Orthodox Diocese v. Milivojevich*, supra; *Rayburn v. General Conference of Seventh Day Adventists*, supra. To permit or require others in the religious body to participate in the counseling process would not only jeopardize the pastor-parishioner privilege, but would be generally contrary to the beliefs of the body. Similarly, the imposition of standards of supervision on pastoral counseling violates the Free Exercise Clause, as well as the Establishment Clause. *Watson v. Jones*, 80 U.S. (13 Wal.) 679 (1871); *Serbian Orthodox Diocese v. Milivojevich*, supra; *Lemon v. Kurtzman*, supra; *Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1970). See also Laycock *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 80 Colum. L. Rev. 1373 (1981); Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984).

Preaching, teaching and pastoral counseling are religious per se and have occurred for centuries. Unusual or unconventional methods used in any of these does not change what they are or cause them to lose their constitutional protection. *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713-14 (1981). In *Thomas*, it is correctly proclaimed:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that

> question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

450 U.S. at 713-14.

II. SUPREME COURT OF COLORADO DECISION VIOLATES PROPER ANALYSIS FOR IMPOSING LIABILITY ON THE CHURCH

Measuring the reasoning of the Supreme Court of Colorado and the lower courts holding Bear Valley Church of Christ liable by the foregoing analysis demonstrates its erroneousness. The "threshold matter", according to the supreme court, is whether "Bear Valley asserted a sincere religious basis for Wolfe's use of therapeutic massage with counselees." Appendix, page 12 of Bear Valley petition. This is clearly contrary to *Thomas*. The issue is not whether the pastor's method had a doctrinal foundation, but was it employed in furtherance of a religious practice. A religious practice, according to *Thomas*, "need not be acceptable, logical, consistent, or comprehensible to others," yet it is still protected by the First Amendment. 450 U.S. at 713-14. The effect of the Colorado court decision is to hold that unless everything done in a religious activity such as counseling is clearly religious with some doctrinal basis for it, the counseling is transformed thereby into a non-religious activity without constitutional protection which cannot stand in the face of *Thomas*.

Attempting to determine whether conduct during a religious activity is or is not religious is also in conflict with *Lemon v. Kurtzman*, supra, and *Walz v. Tax Comm'n*, supra. If a statute or ordinance were enacted to set out guidelines for such a determination, it would contravene both religion clauses. *Lemon v. Kurtzman*, supra; *Thomas v. Review Board of the Ind. Employment Secur. Div.*, supra. No greater entanglement in religious matters can be imagined than to review every method used in a religious endeavor.

If by "threshold matter" the Colorado court meant that tortious conduct precludes constitutional protection for the conduct, this could only apply to the pastor. *Reynolds v. United States*, supra; *Cantwell v. Connecticut*, supra. But, it could not apply to the church. *Dausch v. Rykse*, supra; *Strock v. Pressnell*, supra. Abuse of a counselee was not a teaching or practice of the church. It was not authorized, and it did not further the ministry of the church. Therefore, no vicarious liability is appropriate.

The Colorado courts as well as the parties here erroneously contend that sincerity of religious belief is a necessary element of a constitutional defense to the Respondents' claims. This error has as its genesis a failure to understand when sincerity of belief is proper and a misreading of *United States v. Ballard*, 322 U.S. 78 (1944), along with other cases addressing the subject.

Sincerity of belief is only a proper issue where a religious practitioner seeks an exemption from a governmental regulation affecting the populace at large or a portion of it. *Hernandez v. Commissioner*, 490 U.S. 680 (1989), (tax exemption case); *United States v. Seeger*, 380

U.S. 163 (1965), (exemption from military service); *Wisconsin v. Yoder,* 406 U.S. 205 (1972), (exemption from compulsory attendance at school); *Sherbert v. Verner,* 374 U.S. 398 (1963), (employment benefit requirements); *Frazee v. Illinois Employment Security Dept.,* 489 U.S. 829 (1989), (employment benefit requirements); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136 (1987), (employment benefit requirements). Cases such as *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988), *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993), cert. denied 114 S.Ct. 2135 (1994), and *Erickson v. Christenson,* 781 P.2d 383 (Or. 1989), cited by the Colorado court below and Respondents do not have a sincerity issue because the alleged conduct is not religious. Even if it were sincere, there is no benefit because of *Reynolds v. United States,* supra, and *Cantwell v. Connecticut,* supra. This is a disingenuous argument.

United States v. Ballard, supra, was a suit attacking practices within a ministry that were religious in nature. The Ballards represented in their writings that they had "the power to heal persons of ailments and diseases." 322 U.S. at 80. This Court ruled that "the indictments" attacked not only the propriety of the jury considering the truth of their beliefs, but also the sincerity with which they were held, according to the following:

> Their demurrer and motion to quash made clear their position that the issue should be withheld from the jury on the basis of the First Amendment. Moreover, their position at all times was and still is that the court should have gone the whole way and withheld from the jury both that issue and *the issue of their good faith.* . . . Their

> arguments that the truth of their religious doctrines or beliefs should have gone to the jury when the question of their good faith was submitted was and is merely an alternative argument. They never forsook their position that the indictment should have been dismissed and that *none of it was good*. . . . Whatever this particular indictment might require, the First Amendment precludes such a course. (Emphasis added.)

322 U.S. at 85, 86. In spite of the fact that the trial court only tried the sincerity of beliefs and withheld an issue on the truth of them, the preceding language is very clear that the First Amendment precluded "this particular indictment." 322 U.S. at 86.

The final basis for holding the church liable was negligent hiring, supervising, disciplining, and discharging of the pastor. Appendix, page 17 of Bear Valley petition. Concerning negligent hiring, the court found expert testimony was received at trial that the pastor was not qualified for his position because his only experience was as a pastor. As to negligent supervision, the court pointed to expert testimony that the pastor was not supervised by any qualified individual. All of this testimony is contrary to *Gonzalez v. Roman Catholic Archbishop*, supra, and *Kedroff v. Saint Nicholas Cathedral*, supra, because the elders are the governing body of the church and have the constitutional prerogative to determine the qualifications of its ministers and how they are supervised.

The expert testimony that the pastor's counseling techniques were unreasonable though not tortious per se, and that the elders received complaints from other church members of his techniques were, in the opinion of

the court, sufficient to put the elders on notice to investigate and suspend the pastor because of the foreseeability of harm. This is the "generic" standard of care testimony condemned in *Milivojevich*. 426 U.S. at 713.

Even if the elders had investigated the pastor's counseling techniques after receiving the first complaint, they would have discovered nothing criminal or tortious. The district court aptly wrote at the end of *Schmidt*, to wit:

> It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop.

779 F.Supp. at 332.

III. BREACH OF FIDUCIARY DUTY IS CLERGY MALPRACTICE IN DISGUISE AND FAILS TO FIND SUPPORT IN ANY LEGITIMATE THEORY OF LIABILITY FOR A RELIGIOUS BODY.

To apply breach of fiduciary duty to a religious body that has not authorized tortious conduct requires a negligence standard. It is either a secular or religious standard with either being contrary to *Milivojevich*. Furthermore, this theory is nothing more than clergy malpractice which has thus far been rejected by every court to whom it has been presented. *Dausch v. Rykse*, supra; *Schmidt v. Bishop*, supra; *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 911 (Neb. 1993); *Moses v. Diocese of Colorado*, supra; *Byrd v. Faber*, supra; *Strock v. Pressnell*, supra; *Destefano v. Grabrian*, supra; *Nally v. Grace Com. Church of*

the Valley, 763 P.2d 948 (Cal. 1988), cert. denied 490 U.S. 1007 (1989).

The federal courts and several state courts have correctly analyzed breach of fiduciary duty to be clergy malpractice in disguise. *Dausch v. Rykse*, supra; *Schmidt v. Bishop*, supra; *Schieffer v. Catholic Archdiocese of Omaha*, supra; *Strock v. Pressnell*, supra. In *Dausch*, a member of a church sued the pastor and the church because of sexual relations she had with the pastor to whom she had come for counseling. 52 F.3d at 1427. The Seventh Circuit affirmed the dismissal of the breach of fiduciary duty claim reasoning:

> At the outset the district court concluded that, even though the church defendants might be characterized as her "spiritual and religious advisors" . . . that relationship was not, under the law of Illinois, that of a fiduciary. With respect to Rykse, the court concluded that he *did not have a fiduciary duty, but rather a general duty* to refrain from violating the law. More fundamentally, the court determined that the *allegation of fiduciary duty was simply an elliptical way to state a clergy malpractice claim*, a cause of action that it had already held to be not recognized in Illinois. (Emphasis added.)

52 F.3d at 1428-29. Likewise, the Supreme Court of Nebraska ruled the same way in *Schieffer v. Catholic Archdiocese of Omaha*, supra. The suit was brought by a parishioner against a priest and the archdiocese because of a sexual relationship with the priest that arose out of a counseling relationship. 508 N.W.2d at 909-10. In affirming the district court, the supreme court followed the reasoning in *Schmidt v. Bishop*, supra, to wit:

> [I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence. . . . *[A]s with her negligence claim, [the plaintiff's] fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in malpractice.* (Emphasis added.)

508 N.W.2d at 912. The court observed that breach of fiduciary duty had been accepted in *Destefano v. Grabrian*, supra, and *Erickson v. Christenson*, supra, but did not find the reasoning in them persuasive. 508 N.W.2d at 912.

It is the breach of a "general duty" described in *Dausch* by the pastor that may have occurred in this cause, but there was no breach of a "fiduciary duty" by either the pastor or the church. Breach of fiduciary duty cannot be a basis for vicarious liability, even according to *Destefano v. Grabrian*, supra, because the pastor was not carrying out any belief or teaching of the church. 763 P.2d at 287. The church can have no liability because the elders had no knowledge of alleged tortious conduct by the pastor until late in discovery just prior to trial. *Mrozka v. Archdiocese of St. Paul & Minneapolis*, supra; *Doe v. Redeemer Lutheran Church*, supra. It was not reasonably foreseeable to the elders based on the knowledge they had that someone in the future might be injured, according to both *Mrozka* and *Doe*.

CONCLUSION

This Court is presented with a rare opportunity to set forth an analysis for all of the other courts, federal and state, to use in how to adjudicate suits against religious bodies and those in authority in them. Religious bodies give so much to help so many that they should not be subjected to unlawful litigation that threatens their very existence.

Respectfully submitted,

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